Supreme Court of the United States

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, *et al.*,
Petitioners,

v.

JOHN DOE # 1, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

SHERYL G. SNYDER
DAVID S. KAPLAN
FROST BROWN TODD LLC
400 West Market Street
32nd Floor
Louisville, KY 40202
(502) 589-5400

CARTER G. PHILLIPS
JOSEPH R. GUERRA*
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LESLYE BOWMAN
LFUCG DEPARTMENT OF LAW
200 East Main Street
11th Floor
Lexington, KY 40507
(859) 258-3500

Counsel for Petitioner

November 10, 2005 * Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Where a district court determines that a class should not be certified, does Rule 23(e) of the Federal Rules of Civil Procedure nevertheless authorize a district court to require notice of the named plaintiffs' voluntary dismissal of their claims to those persons who were putative class members under the invalid class allegations.

2. Whether Rule 60(b)(4) of the Federal Rules of Civil Procedure permits a non-party to void a final judgment solely on the grounds of abuse of discretion.

PARTIES TO THE PROCEEDING

In addition to the parties listed on the caption, the parties to the proceedings include the following petitioners:

H. Foster Pettit
James Amato
Scotty Baesler
Pam Miller
Michael Wilson
Robert Jefferson
George Brown
John McFadden
Lawrence Walsh
Barbara Curry
Arnold Gaither
Donna Alexander Cantrell
Sandra Nichols
Mary Ann Delaney

and ninety-five "John Does" and all others similarly situated as respondents.

Plaintiffs and/or appellants below who are not parties to this petition include:

Barry Lynn Demus, Jr.
Octavius Gillis
Keith Rene Guy, Sr.
Craig Johnson
David T. Jones
Christopher Andrew Williams

and seven "John Does" and all others similarly situated.

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Petitioners Lexington-Fayette Urban County Government, H. Foster Pettit, James Amato, Scotty Baesler, Pam Miller, Michael Wilson, Robert Jefferson, George Brown, John McFadden, Lawrence Walsh, Barbara Curry, Arnold Gaither, Donna Alexander Cantrell, Sandra Nichols, and Mary Ann Delaney (collectively "LFUCG") respectfully seek a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit (App. 1a-19a) is reported at 407 F.3d 755 (6th Cir. 2005). The order denying the Petition for Rehearing En Banc (App. 120a) was entered on August 12, 2005 and is unreported. The district court orders granting summary judgment against plaintiffs on statute of limitations grounds are unreported and were entered on April 15, 2003 and November 21, 2003. App. 70a-98a, 20a-49a. The district court orders denying plaintiffs' Rule 60(b)(4) motions to void its orders denying class certification in two prior actions, and denying plaintiffs' motions to intervene in those earlier actions, are unreported and were denied on October 7, 2003. App. 50a-59a, 60a-69a. The earlier district court orders denying class certification are unreported and were entered on April 4, 2000 and June 28, 2002. App. 101a-104a, 99a-100a.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 2005. On August 12, 2005, the court of appeals entered an order denying LFUCG's timely motion for a rehearing and rehearing en banc. App. 120a. The district courts had jurisdiction under 28 U.S.C. § 1331. The court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

The texts, in relevant parts, of Federal Rule of Civil Procedure 23(e) (2003) and of Federal Rule of Civil Procedure 60(b) are set forth at App. 121a.

STATEMENT OF THE CASE

In the extraordinary decision below, the Sixth Circuit created two separate circuit conflicts on important issues of federal law. First, the Sixth Circuit held that, even though a district court concludes that there is no basis for certifying a class, Federal Rule of Civil Procedure 23(e) still authorizes the court to require notice of a voluntary dismissal of the named plaintiffs' claims to "members" of the non-existent "class." This decision squarely conflicts with decisions of the Fifth and Second Circuits, which have held that Rule 23(e) does not apply in such circumstances. The Sixth Circuit's ruling also conflicts with the reasoning of the Fourth and Ninth Circuits, which have likewise recognized that Rule 23(e)'s notice requirement is inapplicable where class certification is denied.

The underlying issue of class action procedure is enormously important. Under this Court's decision in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), the statute of limitations is tolled during the pendency of a "putative" class action—*i.e.*, one in which a class has been alleged but not yet certified—and begins to run anew if certification is denied. The Sixth Circuit's ruling impermissibly expands this already generous principle. It authorizes a district court to require notice to "members" of the non-existent "class" in order to protect reliance interests they may have developed as a result of the tolling principle itself, thereby upsetting the careful balance this Court struck in *American Pipe* between the interests of finality and repose served by statutes of limitations, and the interests of efficiency served by Rule 23. This expansion of *American Pipe* is inconsistent with the language

of Rule 23, and imposes significant costs and burdens on litigants.

The issue is also a recurring one that can affect a great many litigants. There were over 5,000 class actions pending in federal courts during the 12-month period that ended September 2004, and a 2004 study showed that class certification is denied in 27 percent of class action cases. Accordingly, review of this important issue is warranted both to avoid costly notice requirements in hundreds of cases where class certification is denied and to ensure that Rule 23(e)'s notice requirements apply uniformly throughout the federal courts.

Second, based on its misinterpretation of Rule 23(e), the court below went on to hold that the district court's failure to require notice to a non-existent class was an abuse of discretion that justified voiding a final judgment under Rule 60(b)(4). Given the bedrock importance of finality, Rule 60(b)(4) is properly invoked only when a judgment is "void" due to lack of jurisdiction over the subject matter or person, or a due process violation. The Sixth Circuit's dramatic expansion of Rule 60(b)(4) to permit relief based on mere abuse of discretion conflicts with decisions in the Second and Seventh Circuits, which preclude relief on such grounds. In addition, the decision below exacerbates the division among the lower courts over whether non-parties can seek relief under Rule 60(b). The Sixth Circuit's interpretation of Rule 60(b)(4) threatens the finality of voluntary dismissals of class actions, and can only increase the difficulties that parties already face when seeking to settle such expensive litigation. Accordingly, this Court should grant the petition to resolve the conflicts in the lower courts over these significant issues as well.

PROCEEDINGS IN THIS CASE

For nearly thirty years, Petitioner Lexington-Fayette Urban County Government helped to fund a summer program for inner city youth that was founded by Ronald Berry. Claiming

Berry had molested them, seven former participants, including Keith Rene Guy, Sr., initiated criminal charges in the late 1990s, which eventually led to Berry's conviction for 12 counts of sodomy and abuse of minors. This petition arises out of a series of civil actions, filed in the wake of this conviction, in which various plaintiffs sought to hold LFUCG liable based on allegations that it knew of and concealed Berry's actions.

A. *Guy*

On October 15, 1998, four former youth program participants who were among those who initially brought the criminal charges against Berry filed a complaint in the United States District Court in the Eastern District of Kentucky, alleging that LFUCG was aware of and deliberately indifferent to Berry's molestation. *Guy* v. *LFUCG*, No. 98-431-KSF. This initial complaint contained a class action allegation that a panel of the Sixth Circuit ultimately deemed frivolous. This panel of the Sixth Circuit observed that:

> [I]n direct contradiction of the allegations in their complaint, the plaintiffs stated in their filing that "[t]he Plaintiffs have never requested that the subject action be certified as a class action principally because of numerosity." Then apparently confessing a violation of Fed.R. Civ.P.11, the plaintiffs stated, "The Plaintiffs have *never* believed that the class was . . . so numerous that joinder of all members [was] impracticable."

Guy v. *LFCUG*, App. 107a (citation omitted) (alterations and omission in original).

On January 12, 2000, Craig Johnson and David Jones, who alleged that they were also victims of Berry, filed an entry of appearance and a motion to send notice of any settlement to any absent class members. On January 14, 2000, prior to any decision as to class certification or notice, all four original plaintiffs settled and filed a joint motion seeking dismissal. Two weeks later, Johnson and Jones sought to intervene in

the action and to be named class representatives of Berry's alleged victims.

On February 4, 2000, the district court issued an order dealing with these various motions. The court approved the settlement of three of the named plaintiffs, but ordered a hearing on Guy's claim that his attorneys were not authorized to settle on his behalf. The court rejected Johnson and Jones' motions to intervene, but reserved decision on their request for class certification. Subsequently, on February 28, 2000, the court rejected Guy's contentions, approved his settlement, and dismissed his claims. App. 111a. The Sixth Circuit subsequently affirmed this disposition on appeal. *Id.* at 105a-119a.

The district court decided the class certification and notice issues on April 4, 2000. The court first considered and rejected Johnson and Jones' request for class certification, finding that the proposed class failed to meet the numerosity requirement of Rule 23(a). App. 101a-104a. The court noted the "enormous amount of publicity about the case" and its belief "that it is unlikely that many more alleged victims will come forward." *Id.* at 104a. Further, the court reasoned that it was not required to give "settlement notice to an invalid class." *Id.* at 103a. Johnson and Jones appealed these decisions.

B. *Doe I*

On May 3, 2000, shortly after filing the foregoing appeal, Johnson and Jones, along with seven John Does, filed a second complaint raising essentially the same factual and class allegations as in *Guy*. *Doe* v. *Miller*, No. 00-166-KSF ("*Doe I*"). After discovery and full briefing on the issue, the district court denied class certification on June 28, 2002. App. 99a-100a. The parties' settlement of their individual claims was approved by the district court on that same day. Some four months later, on October 15, 2002, Johnson and Jones withdrew their still-pending appeal of the April 4, 2000 order that had denied class certification and notice in *Guy*.

C. *Doe II*

On September 25, 2002, another group of John Does, represented by one of the same attorneys for the plaintiffs in *Doe I*, filed yet another class complaint. *Doe #1-33* v. *LFUCG*, No. 02-439-JMH ("*Doe II*"). This complaint mirrored those in the prior lawsuits. On April 23, 2003, the district court dismissed the complaint as time-barred. App. 70a-98a.

D. *Doe III*

Once again, on the same day *Doe II* was dismissed, another group of John Does represented by the same attorneys filed a fourth class action raising essentially the same issues on behalf of other John Does. *Doe #1-44* v. *LFUCG*, No. 03-12-JMH ("*Doe III*"). The district court also dismissed this action as barred by the statute of limitations on November 21, 2003. App. 20a-49a.

E. The Plaintiffs' Motions To Vacate The Final Judgments In *Guy* And *Doe I*

The unsuccessful plaintiffs in *Doe II* and *Doe III* whose claims had been dismissed filed motions to intervene in *Guy* and *Doe I*, coupled with Rule 60(b)(4) motions to reopen the final judgments in those two cases. Their apparent objective was to turn back the clock on the statutes of limitations which had resulted in the dismissal of their claims in *Doe II* and *Doe III* and intervene in the first two actions in this series of cases, *Guy* and *Doe I*. Rule 60(b)(4) permits a court to take the extraordinary action of setting aside a judgment if the "judgment is void." Fed. R. Civ. P. 60(b)(4). As to the plaintiffs' request in *Guy*, the district court noted that "[a] judgment is void under 60(b)(4) 'if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or of it acted in a manner inconsistent with due process of law.'" App. 63a (alteration in original) (citing *Antoine* v. *Atlas Turner, Inc.*, 66 F.3d 105, 108 (6th Cir. 1995)). The district court rejected plaintiffs' argument that their due process rights were violated when it denied notice to "members" of the non-existent class

in *Guy*. The court reasoned that, although there was some authority requiring notice to a putative class (*i.e.*, an alleged but not yet certified class), "[i]t is another matter altogether, . . . that Rule 23(e) could apply in a case where a court has expressly denied class certification, and thus determined that the action is not a class action." *Id.* at 64a. Accordingly, the district court declined to upset the earlier judgment and refused the motion to intervene. *Id.* at 60a-69a.[1]

F. The Sixth Circuit's Decision

The plaintiffs in *Doe II* and *Doe III* appealed the denials of their request for relief under Rule 60(b)(4) to the Sixth Circuit. They contended that the district court's decisions not to issue notice under Rule 23(e) in *Guy* and *Doe I* violated that Rule and the Due Process Clause of the Fifth Amendment of the Constitution, and that these alleged violations justified relief under Rule 60(b)(4). App. 7a-8a. The Sixth Circuit held that Rule 23(e) was violated and reversed.

It observed that "[m]ost courts have found that Rule 23(e)'s notice requirement applies to putative class members as well as to certified class members."[2] App. 8a-9a (emphasis omitted) (citing to opinions of the Seventh, Eighth, Ninth and Eleventh Circuits). The Sixth Circuit recognized that other courts "have not required notice to putative class members as a general rule." *Id.* at 9a. But it noted that even these courts

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[1] The district court reached the same result in *Doe I*, also rejecting the plaintiffs' request to re-open the judgment in that case. App. 50a-59a.

[2] The Sixth Circuit addressed the language of Rule 23(e) prior to its amendment in 2003. Critically, however, both the current and prior versions of Rule 23(e) required notice only to members of a "class." *Compare* Fed. R. Civ. P. 23(e) (2003) ("notice of [a] proposed dismissal or compromise shall be given to all *members of the class* in such manner as the court directs") (emphasis added), *with id.* 23(e)(1)(B) (2005) ("The court must direct notice in a reasonable manner to all *class members* who would be bound by a proposed settlement, voluntary dismissal, or compromise.") (emphasis added).

"have warned that a failure to provide notice is justified only in instances free of prejudice and collusion." *Id.*

The Sixth Circuit acknowledged that most of the cases it had canvassed involved putative classes. In both *Guy* and *Doe I,* by contrast, class certification had been denied. The court below noted, however, that in *Culver* v. *City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002), and *Birmingham Steel Corp.* v. *TVA*, 353 F.3d 1331 (11th Cir. 2003), the Seventh and Eleventh Circuits had required notice where district courts had initially certified classes, then later de-certified them as improper. App 8a-9a. Based on its review of this caselaw, the Sixth Circuit concluded:

> that Rule 23(e) applies in a precertification context where putative class members are likely to be prejudiced. Moreover, because of the public policy considerations involved, we further adopt the reasoning articulated by the Seventh Circuit in *Culver* that Rule 23(e) may be applied where the district court has already rejected class certification.

Id. at 13a-14a.

The court set forth a multi-factor test for identifying when the possibility of prejudice might require notice, including the level of press coverage of the alleged class action. Applying this test to the facts of this case, the Sixth Circuit concluded that the district court had "abused its discretion in not providing notice in both *Guy* and *Doe I*." App. 13a. In reaching this conclusion, the Sixth Circuit noted that "the local media devoted substantial coverage to the abuse [committed by Berry] . . . . including coverage of the *Guy* and *Doe I* lawsuits." *Id.* The court therefore assumed—incorrectly—that this media attention had led the plaintiff-appellants to rely on those actions to represent their interests. *Id.*[3] In addition, the

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[3] This assumption overlooks the uniform testimony of each plaintiff who was deposed in *Doe II* stating that they first became aware of their potential claims against the defendants during the summer of 2002, when

Sixth Circuit took issue with the district court's conclusion in *Guy* that there were likely few members in the class. Given how long Berry had run the youth program, the Sixth Circuit concluded that "[t]here was in fact substantial reason to believe that many more victims would come forward, as in fact actually occurred with the filing of the *Doe II* and *Doe III* lawsuits." *Id.*

On the question of relief under Rule 60(b)(4), the Sixth Circuit acknowledged that the governing test is quite stringent: a judgment is "void" within the meaning of the rule only if the district court lacked jurisdiction or acted in a manner that violates due process. App. 8a. Based merely on its finding that the district court had "abused its discretion" and "erred in failing to provide notice," the Sixth Circuit voided and vacated the judgment of dismissal in *Guy* under Rule 60(b)(4). *Id.* at 13a-14a. The court of appeals, however, declined to disturb the judgment in *Doe I* to "reach[] the equitable result of allowing the Does to go forward with their case while preserving the settlement reached by the *Doe I* parties." *Id.* at 14a.

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the media reported the settlement of *Doe I*. This testimony established that these plaintiffs 1) were not aware of the *Guy* action so they could not have relied on its pendency and 2) were on actual notice of the settlement of *Doe I* and therefore could not have been prejudiced by a failure to receive notice. Consolidated Final Brief of Defendants-Appellees at 31, *Doe* v. *Lexington-Fayette Urban County Gov't*, Nos. 03-6490 & -6517 (6th Cir. filed May 21, 2004).

REASONS FOR GRANTING THE PETITION

I. WHETHER RULE 23(e) AUTHORIZES COURTS TO REQUIRE NOTICE IN CASES WHERE CLASS CERTIFICATION IS DENIED IS AN IMPORTANT QUESTION ON WHICH THE COURTS OF APPEALS DISAGREE.

A. There Is A Conflict Among The Courts Of Appeals.

The Sixth Circuit has created a conflict among the circuits on an important question of class action procedure. The decision in this case conflicts with decisions of the Fifth and Second Circuits, which have held that Rule 23(e)'s notice requirements do not apply where class certification is denied. The Sixth Circuit's ruling is also irreconcilable with the reasoning of the Ninth and Fourth Circuits, which have likewise recognized the inapplicability of Rule 23(e)'s notice requirements in such circumstances.

As this Court has recognized, class certification is a signal event in a class action lawsuit. *Baxter* v. *Palmigiano*, 425 U.S. 308, 311 n.1 (1975) (without "certification and identification of the class, the action is not properly a class action"). Until certification, "a class action is supported solely by the pleadings, which may or may not have a foundation in fact compatible with the requirements of rule 23(a) and (b)." Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 Duke L.J. 573, 596 & n.100 ("Prior to certification, the class is only a denominated or putative class rather than an independent entity before the court."). Thus, as the Fourth Circuit has aptly stated, it is the actual certification:

> which alone gives birth to "the class as a jurisprudential entity," changes the action from a mere individual suit with class allegations into a true class action qualifying under 23(a), and provides that sharp line of demarcation

> between an individual action seeking to become a class action and an actual class action.

Shelton v. *Pargo, Inc.*, 582 F.2d 1298, 1304 (4th Cir. 1978).

Certification ensures that absent class members are bound to any final judgment or settlement secured by the named representative plaintiff. Because of this binding effect, "[o]nce the suit is certified as a class action, it may not be settled or dismissed without the approval of the court." *Sosna* v. *Iowa*, 419 U.S. 393, 399 n.8 (1975). And, following class certification, notice of a dismissal or settlement of the named plaintiffs' claims must be provided to protect the rights of absent class members. By contrast, where a court denies certification, the jurisprudential entity of the class never comes into being, and those persons who were formerly putative members of the alleged class will not be bound by any decisions in, or disposition of, the litigation.

Unlike the Sixth Circuit below, the Fifth Circuit has recognized that, once class certification is denied, Rule 23(e)'s notice requirements do not apply. In *Pearson* v. *Ecological Science Corp.*, 522 F.2d 171 (5th Cir. 1975), the Fifth Circuit noted that, "to protect the rights of absent class members during the 'interim between filing and the [class certification] determination' . . . . , other courts have required that for purposes of the notice provisions of [Rule 23] that the action be presumed proper for class determination." *Id.* at 177. But the Fifth Circuit "decline[d]" to "extend the judicial gloss on subdivision (e) of Rule 23 to encompass the situation where . . . the trial court has determined . . . that the action may not be maintained as a class action under Rule 23." *Id.* In that circumstance, "the notice requirements of Rule 23(e) *do not apply*, at least where the dismissal and settlement of the action do not directly affect adversely the rights of individuals not before the court." *Id.* (emphasis added). "'[A] *negative determination* (of class action status) means that *the action should be stripped of its character as a class action.*'" *Id.* (quoting Advisory Committee Notes to Rule 23, 39 F.R.D.

104). The Fifth Circuit has adhered to this rule since *Pearson*. See *Jones* v. *Caddo Parish Sch. Bd.*, 735 F.2d 923, 937 n.16 (5th Cir. 1984) ("we have held that notice to the class of denial of class certification is not necessary"); *Roper* v. *Consurve, Inc.*, 578 F.2d 1106, 1110 (5th Cir. 1978) (quoting *Pearson*'s holding).

The Sixth Circuit mistakenly suggested that *Pearson* supported its decision to require notice to a non-class. See App. 9a (introducing *Pearson* with a *cf.* cite). The Sixth Circuit apparently believed that, in leaving open the possibility that Rule 23(e)'s notice requirement could apply where dismissal would "directly affect adversely the rights" of former putative members, *Pearson* contemplated Rule 23(e) notice to prevent the type of "prejudice" that concerned the Sixth Circuit here—*i.e.*, the possible running of the limitations period following a denial of certification. In fact, *Pearson* expressly rejected the notion that this was a type of "prejudice" at all.

The Fifth Circuit noted in *Pearson* that the former putative class members in that case could have filed lawsuits within the limitations period after the district court denied class certification. 522 F.2d at 179. Even though no notice of the class denial had been provided, the Fifth Circuit stated that any person who had failed to file a suit after the certification denial "can blame no one but himself if his action is now barred: 'If such a bar does exist, it is the result of . . . lethargy and indifference and not the breach of any duty . . . on the part of the plaintiff or the Court.'" *Id.* (quoting *Polakoff* v. *Delaware Steeplechase & Race Ass'n*, 264 F. Supp. 915, 916 (D. Del. 1966)). Thus, the Fifth Circuit plainly viewed the possibility that the limitations period might run on former putative class members following a denial of class certification as a problem attributable to those former putative class members, not a type

of "prejudice" requiring a defendant to shoulder the burden of providing notice to "members" of a non-existent class.[4]

The Fifth Circuit's reasoning thus confirms the square conflict between the holding in *Pearson* and the decision below. Just as in *Pearson*, the former putative class members in *Guy* could have filed new actions within the limitations period even after class certification was denied, as the *Doe I* complaint illustrates. In this very circumstance, the Fifth Circuit has ruled that Rule 23(e)'s notice requirements do not apply, whereas the Sixth Circuit has ruled that those requirements do apply in such circumstances, and that the district court here abused its discretion by failing to require notice.

The Sixth Circuit's notice rule also conflicts with a recent unpublished decision of the Second Circuit. In that case, as in *Pearson*, a party argued that, under Rule 23(e), a district court had a duty, after denying class certification, to ensure that former putative class members received notice of the class certification denial. *Fuller* v. *Instinet, Inc.*, 120 Fed. App'x 845, 846 (2d Cir. 2004). The Second Circuit rejected that claim, holding that, "[b]y its terms, former Rule 23(e) does not require notice to potential class members on a denial of class certification." *Id.* The appellant in *Fuller*, like respondents here, relied on the Seventh Circuit decision in *Culver*. In stark contrast to the decision below, however, the Second Circuit "decline[d] to adopt the rule or reasoning of *Culver* in light of the plain language" of the Rule. *Id.* at 847.[5]

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[4] By contrast, *Simer* v. *Rios*, 661 F. 2d 655 (7th Cir. 1981), provides an example of how settlement of a non-class action can "directly affect adversely the rights of individuals not before the court," *Pearson*, 522 F.2d at 177, within the meaning of *Pearson*. In *Simer*, a putative class action was settled through payment of money from a limited pool of funds. As a result, even though non-parties were not "bound" by the settlement in any legal sense, their rights were directly and adversely affected, because they were deprived of a chance for full recovery on their own claims. 661 F.2d at 667.

[5] Even before *Fuller*, district courts in the Second Circuit had followed the principle that Rule 23(e)'s notice requirements do not apply where

The decision below is also inconsistent with the reasoning, if not the holdings, of the Ninth Circuit in *Diaz* v. *Trust Territory*, 876 F.2d 1401 (9th Cir. 1989), and the Fourth Circuit in *Shelton* v. *Pargo, Inc.*, 582 F.2d 1298 (4th Cir. 1978). In *Diaz*, the Ninth Circuit stated categorically that, "if the court determines for any reason that class certification should be denied, it can thereafter dismiss the class allegations without notice. In other words, Rule 23(e) notice is not required where the dismissal is involuntary." 876 F.2d at 1406 (citing *Roper*, 578 F.2d at 1110, which relies on *Pearson*).

In *Shelton*, the Fourth Circuit undertook a careful analysis of whether district courts were required to follow a procedure, first adopted in *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 42 F.R.D. 324 (E.D. Pa. 1967), whereby pre-certification settlements and motions to dismiss were held in abeyance until a ruling on class certification. Under this procedural rule, Rule 23(e) notice could be dispensed with "[o]nly if [class] certification were found improper." *Shelton*, 582 F.2d at 1309. Significantly, the Fourth Circuit accepted the premise that notice was not required when class certification was denied, but rejected as "inflexible and formalistic" a procedural rule that allowed courts to dispense with notice *only* in that situation. *Id.* The court held that, even when class certification has not been denied, a putative class action can still be dismissed without notice as long as the district court does not find that the "settling plaintiff has used the class action claim for unfair personal aggrandizement in the settlement, with prejudice to absent putative class members." *Id.* at 1314.

Indeed, the Fourth Circuit expressly questioned the very concept of "prejudice" that, according to the Sixth Circuit,

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class certification is denied. *See, e.g.*, *Sheinberg* v. *Fluour Corp.*, 91 F.R.D. 74, 75 (S.D.N.Y. 1981) ("[N]one of the reasons which underlie the notice requirements of Fed.R.Civ.P. 23 and 23.1 with respect to voluntary discontinuances are operative here; no one's rights are being cut off and no potential abuses are present.").

mandated notice in this case. The Fourth Circuit explained that, because a pre-certification dismissal does not bind absent putative class members, such members have "at best a mere reliance interest" that is "often thought to be so 'speculative' as to warrant little or no consideration." *Id.* at 1314-15 (internal quotation marks omitted). This is because "reliance can occur only on the part of those persons" who both "learn[] of the action through the news media or some other secondary source" and "are sophisticated enough in the ways of the law to understand the significance of the class action allegation." *Id.* at 1315 (internal quotation marks omitted).[6] Indeed, in this case, the Sixth Circuit's finding of "prejudice" rests not only on the factually incorrect assumption that the former putative class members in *Guy* were aware of that case, see note 3, *supra*, but on the further assumptions that those persons (a) understood that the case was a class action, (b) understood that a class action tolled the statute of limitations on their own claims, and (c) expected to be notified of any dismissal that might deprive them of the benefit of such tolling.

In fact, this Court's reasoning in *American Pipe* does not support the premise that former putative class members are "prejudiced" by the dismissal of an action that does not qualify as a class action. In *American Pipe*, this Court held that the pendency of a putative class action tolls the statute of limitations for all putative class members, even those "unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings." 414 U.S. at 552. Tolling was dictated not by reliance interests but by the language of Rule 23 itself, which makes clear that a class action was "no longer 'an invitation to join-

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[6] For these reasons, the Fourth Circuit held that, "[i]n weighing whether to require a certification determination and notice under the foregoing rule, the District Court 'should focus primarily on the possibility that the pre-certification compromise is the product of collusion.'" *Shelton*, 582 F.2d at 1314.

der,'" as it had been prior to 1966, but "a truly representative suit," the "commencement of [which] satisfie[s] the purpose of the limitation provision as to all those who might subsequently participate in the suit." *Id.* at 550, 551.

Thus, class action tolling is not a rule of equity designed to protect presumed reliance interests of putative class members. Instead, it is a rule compelled by the plain language of Rule 23 that confers benefits on all class members, including those who are "mere passive beneficiaries." *Id.* at 552. In essence, the Sixth Circuit has concluded that a benefit derived from the language of Rule 23 creates reliance interests that justify overriding the language of Rule 23(e), which both today and at the time of the *Guy* litigation authorizes notice to a "class." Under the Sixth Circuit's reasoning, therefore, class allegations that are unfounded—indeed, that were found, in this case, to be frivolous by another panel of the Sixth Circuit, App. 107a—not only confer the benefit of tolling, they authorize courts to require Rule 23 notice where no Rule 23 class exists. In *Pearson* and *Fuller*, the Fifth and Second Circuits properly rejected this counter-intuitive result. This Court should grant the petition to resolve this fundamental conflict.

B. The Issue Is Important.

This conflict over class action procedure is extremely important. Nearly 2,700 new federal class actions were filed during the 12-month period ending September 30, 2004, and a total of 5,179 such actions were pending during this period. See L. Mecham, Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts* tbls. X-4 & X-5 (2004), http://www.uscourts.gov/judbususc/judbus.html. Class certification is denied in slightly more than one-fourth of all federal class actions. See Thomas E. Willging & Shannon R. Wheatman, Fed. Judicial Ctr. *Attorney Reports on the Impact of Amchem and Ortiz on Choice of a Federal or State Forum in Class Action Litigation: A Report to the Advisory Committee on Civil Rules Regarding a Case-based Survey of Attor-*

neys 34 tbl.10 (2004). By concluding that Rule 23(e) authorizes courts to require notice even where class certification is denied, the Sixth Circuit's rule imposes significant and wholly unjustified costs on litigants, and unnecessarily burdens district courts that oversee class action litigation.

This Court has recognized that the costs of providing class action notice can be substantial, but that such costs are necessary because a valid class action will bind absent members. Thus, this Court has held that "[t]here is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974). Instead, "[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." *Id.* at 173; see also *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

The rationale for imposing such costs, however, is wholly inapplicable where class certification is denied. In that circumstance, the former putative members of the invalid class cannot be bound by any disposition of the case. Yet, under the Sixth Circuit's misguided interpretation, Rule 23(e) authorizes courts to impose the significant expense of notifying "members" of non-existent classes that actions improperly instituted on their behalf have been dismissed.

The Sixth Circuit's interpretation also imposes burdens on the courts that must oversee notice to a non-class. It is not at all clear what constitutes "reasonable" notice to members of a non-existent class, particularly where, as here, class certification is denied for lack of numerosity. The Sixth Circuit faulted the district court in *Guy* and *Doe I* for failing to recognize that the longevity of the Berry's youth program would

likely result in many victims. This revisionist view, however, overlooks the finding of an earlier Sixth Circuit panel that the class allegations in *Guy* were frivolous, App. 107a, as well as the fact that few victims had come forward despite the widespread coverage of Berry's conviction and the filing of the *Guy* suit itself. In light of the facts known to the district court, determining what notice would have been sufficient to protect the speculative reliance interests of what the district court reasonably thought to be a relatively small number of unknown victims would have been fraught with difficulties, especially because many of the victims could have long since left the Lexington area. The Sixth Circuit's conclusion Rule 23(e) applies when class certification is denied will force courts to fashion guidelines and principles to govern notice determinations in these and other unusual circumstances—efforts that are entirely unnecessary under a proper interpretation of Rule 23(e).

The costs to litigants and the courts of the Sixth Circuit's novel ruling underscore the necessity of review by this Court. Rule 23(e)'s notice requirements must apply uniformly throughout the nation; an obligation to provide costly notice to a non-existent class should not depend on the fortuity of the circuit in which the litigants reside. As this Court explained in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997):

> courts must be mindful that . . . Rule [23] as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. See 28 U.S.C. §§ 2073, 2074. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered . . . .

Id. at 620. Both the current and prior versions of Rule 23(e) authorize notice to members of a "class," which the district

court properly concluded did not exist in *Guy*. The Sixth Circuit was bound to apply that rule as written, rather than expand its scope and impose burdensome and costly additional notice requirements. Accordingly, this Court should grant the petition to resolve this important issue of class action procedure.

II. THE SIXTH CIRCUIT'S RULE PERMITTING A FINAL JUDGMENT TO BE VOIDED BASED ON A MERE ABUSE OF DISCRETION WARRANTS THIS COURT'S REVIEW.

A. The Sixth Circuit's Unduly Permissive Standard For Voiding Judgments Under Rule 60(b)(4) Conflicts With The Standards Adopted By Other Circuits.

The Sixth Circuit compounded its misinterpretation of Rule 23(e) by holding that a mere abuse of discretion in connection with a notice determination is grounds for voiding a long final judgment under Rule 60(b)(4). This extraordinary ruling conflicts with the decisions of other courts of appeals, which bar such relief based on mere errors or abuses of discretion and do not permit non-parties to void a final judgment. This conflict is also important, not only because it undermines the bedrock importance of finality generally, but does so in the class action context, further complicating efforts to settle these expensive lawsuits.

Rule 60(b)(4) permits a final judgment to be vacated no matter how far in the past a case may have ended. Fed. R. Civ. P. 60(b)(4); *Klapprott* v. *United States*, 335 U.S. 601, 609 (1949) ("Amended Rule 60(b) authorizes a court to set aside 'a void judgment' without regard to the limitation of a year applicable to motions to set aside on some other grounds."). Given the importance of finality, however, other courts have applied Rule 60(b)(4) narrowly. Thus, in stark contrast to the ruling below, both the First and Seventh Circuits have squarely held that an abuse of discretion is *not* a

sufficient ground for voiding a final judgment, and that such relief may be granted only where the court lacked power over the parties or subject matter, or violated due process.

In *Federal Election Commission* v. *Al Salvi for Senate Committee*, 205 F.3d 1015 (7th Cir. 2000), the Seventh Circuit refused to void a judgment of dismissal despite its conclusion that "the district court abused its discretion in dismissing [an] action with prejudice" for failure to comply with the district court's local counsel rules. *Id.* at 1017. The Seventh Circuit explained that, "[w]hile we believe the district court's failure to warn of the impending dismissal constituted abuse of discretion, under the facts of this case it cannot be said that the district court's discretionary abuse rose to the level of due process deprivation." *Id.* at 1019. Accordingly, it denied relief under Rule 60(b)(4).

Similarly, in *O'Rourke Bros., Inc.* v. *Nesbitt Burns, Inc.*, 201 F.3d 948 (7th Cir. 2000), the Seventh Circuit explained that "[a] void judgment is not synonymous with an erroneous judgment. Even gross errors do not render a judgment void." *Id.* at 951. Instead, "[a] judgment is void if the rendering court was without power to enter it; that is, if the court entered a decree 'not within the powers granted to it by the law.'" *Id.* (quoting *United States ex rel. Wilson* v. *Walker*, 109 U.S. 258 (1883)). Applying those principles, the Seventh Circuit refused to void the judgment at issue, concluding that, although involuntary dismissals for failure to effect service "may be frowned on, or even reversed, they are not found to be beyond the power of the court." *Id.* at 952.

The Seventh Circuit has voided a judgment based on a failure to provide notice to a putative class, but only after concluding that such a failure was more than an abuse of discretion, and rose to the level of a due process violation. In *Simer* v. *Rios*, 661 F.2d 655 (7th Cir. 1981), the court concluded that the rights of absent members of a putative class (*i.e.*, an alleged, pre-certification class) were adversely affected by a settlement and dismissal of the named plaintiffs' claims, be-

cause the settlement distributed a limited pool of funds in a manner that impaired absent members' ability to receive full redress for their injuries. *Id.* at 667. Adhering to the principle that "[m]ere error in the entry of a judgment does not render a judgment void for purposes of Rule 60(b)(4)," the court concluded that relief was nevertheless required because, in the case before it, "entry of the settlement decree without notice to putative class members violated the due process rights of the class members." *Id.* at 663.

The First Circuit applies these same principles. In *Hoult* v. *Hoult*, 57 F.3d 1 (1st Cir. 1995), the First Circuit explained that "[a] judgment is not void simply because it is or may been erroneous; it is void only if, from its inception, it was a legal nullity." *Id.* at 6. In that case, the party seeking to void an earlier judgment argued that the district court's admission of certain expert testimony commenting on the credibility of the plaintiff, an alleged victim of childhood sexual abuse, so usurped the role of the jury that it violated due process. *Id.* The First Circuit noted that the expert's testimony "may have crossed the line," but that, under Rule 60(b)(4), it could "review not for abuse of discretion or plain error, but only for a plain usurpation of the jury's function constituting a violation of due process." *Id.* at 7 (internal quotation marks omitted). Because it found no constitutional violation, the court denied relief. *Id.* at 7-8.

In the decision below, of course, the Sixth Circuit did not conclude that the failure to provide notice to members of a non-existent class rose to the level of a due process violation. Nor could it have done so: these absent non-parties were not bound by the judgment in *Guy*, and they made no showing that the monetary settlement provided to the *Guy* plaintiffs would have impaired their ability to collect full damages had they brought their own timely action. Similarly, the Sixth Circuit did not find, and could not have found, that the district court in *Guy* lacked jurisdiction over the subject matter or parties. Instead, it granted relief under Rule 60(b)(4) based

solely on its determination that the district court had "abused its discretion" and "erred in failing to provide notice." App. 13a-14a. That ruling inescapably conflicts with the rulings of the Seventh and First Circuits described above.

The decision below also implicates a subsidiary issue under Rule 60(b)(4) on which the lower courts are divided. In accordance with the language of the Rule itself, the Seventh Circuit has held that only parties to the original judgment, their legal representatives or those in privity with a party may invoke Rule 60(b). See *United States* v. *8136 S. Dobson St.*, 125 F.3d 1076, 1084 (7th Cir. 1997). The Second Circuit has taken a somewhat broader view of who may seek relief under Rule 60(b), though not as broad as the view adopted by the Sixth Circuit in the decision below. In *Dunlop* v. *Pan American World Airways, Inc.*, 672 F.2d 1044 (2d Cir. 1982), the court noted that relief "would not ordinarily be available to non-parties." *Id.* at 1052. Nevertheless, it concluded that where the Secretary of Labor sued an airline under the Age Discrimination Act and Fair Labor Standards, airline pilots on whose behalf the suit was brought, and whose rights under both federal and state law were extinguished by a settlement that afforded them no actual relief, were "sufficiently connected and identified with the Secretary's suit" that they could seek relief under Rule 60(b). *Id.*

In contrast to these courts, the Sixth Circuit voided a judgment on behalf of persons who were indisputably not parties to that judgment, and whose rights were not extinguished by the settlement in that case. Indeed, while the Sixth Circuit faulted the district court's notice decision, it did not rule that the district court should have certified the class in *Guy*, nor, as just noted, did it find that the settlement impaired the Respondents' ability to pursue their own remedies through a timely action. Thus, the court of appeals has created a split with its sister circuits by permitting any person alleging an interest in the litigation, including, as here, a speculative reli-

ance interest, to void a judgment in a case to which he or she was not a party.

B. The Issue Is Recurring And Important.

The Sixth Circuit's wayward interpretation of Rule 60(b)(4) is important to civil litigation generally. The holding threatens to undo any final judgment, no matter how old, based on nothing more than an abuse of discretion. For this reason alone, this Court should clarify the requirements for voiding judgments under Rule 60(b)(4).

But the Sixth Circuit's decision warrants review for the additional reason that it creates uncertainty in the class action context, calling into question old settlements and dismissals, and reviving expired statutes of limitations. As noted above, because certified class actions bind absent members, such an action may not be settled or dismissed without the approval of the court, following notice to members of the class. And courts have, to varying degrees, extended these same protections to the settlement of putative class actions. Thus, the thousands of class actions filed and pending each year are subject to a variety of procedural safeguards that make them (appropriately) far more difficult to settle.

The Sixth Circuit's decision in this case, however, adds unwarranted complexity and uncertainty to settlements even when a district court has found that the prerequisites to class status are not satisfied—and thus, where the action should stand on the same footing as any other individual suit for settlement purposes. In this case, the Sixth Circuit voided a settlement based on a finding of abuse of discretion, which in turn rested on speculative and inaccurate assumptions about reliance on the filing of an action. The risk that a settlement, achieved can be undone years after the fact, and even where class certification was properly denied, can only serve to discourage future settlement efforts in class actions.

The stated justification for the significant confusion and uncertainty caused by the Sixth Circuit's expansive interpre-

tation of Rule 60(b) and the notice requirements for non-class members was "public policy" grounds. App. 13a-14a. Yet, as "[t]his Court has long recognized . . . '[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.'" *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981) (second alteration in original). The important issues of finality and class action procedure raised by the Sixth Circuit's decision in this case require this Court's resolution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SHERYL G. SNYDER
DAVID S. KAPLAN
FROST BROWN TODD LLC
400 West Market Street
32nd Floor
Louisville, KY 40202
(502) 589-5400

CARTER G. PHILLIPS
JOSEPH R. GUERRA*
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LESLYE BOWMAN
LFUCG DEPARTMENT OF LAW
200 East Main Street
11th Floor
Lexington, KY 40507
(859) 258-3500

Counsel for Petitioner

November 10, 2005

* Counsel of Record

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 03-6261, 03-6490, 03-6517, 03-6560

JOHN DOE *et al.*,
Plaintiffs-Appellants,

v.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, *et al.*,
Defendants-Appellees.

JOHN DOE *et al.*,
Plaintiffs-Appellants,

v.

PAM MILLER *et al.*,
Defendants-Appellees.

KEITH RENE GUY, SR. *et al.*,
Plaintiffs-Appellants,

v.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT,
Defendant-Appellee.

Argued: March 16, 2005
Decided and Filed: May 5, 2005
Rehearing and Rehearing En Banc Denied Aug. 12, 2005

Before: COLE and GILMAN, *Circuit Judges*; POLSTER, *District Judge*.*

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* The Honorable Dan Aaron Polster, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

GILMAN, *Circuit Judge*.

In 1969, Ronald Berry founded a summer program for disadvantaged youth called Micro-City Government. This program was funded in part by the Lexington-Fayette Urban County Government (LFUCG). Numerous former teenagers who participated in Micro-City Government now claim that LFUCG continued to support the program even after learning that Berry was sexually molesting them, and that LFUCG knowingly concealed Berry's conduct for political reasons.

These appeals arise from the plaintiffs' attempt to maintain a class-action lawsuit against LFUCG. Although several procedural issues are raised, the key issue is whether to vacate two orders dismissing earlier class-action lawsuits against LFUCG brought by Berry's victims. For the reasons set forth below, we REVERSE the judgment of the district court in *Guy et al. v. LFUCG*, No. 98-431-KSF, and REMAND the case for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual background

From 1969 until 2000, LFUCG provided funding for Micro-City Government, a summer program founded by Ronald Berry. The purpose of the program was to provide part-time summer employment for disadvantaged area youth. According to many of the program's participants, however, Berry physically, mentally, and sexually abused them, with the latest acts of abuse occurring in May of 1995. Berry was subsequently convicted on 12 counts of sodomy and abuse of minors in criminal proceedings brought by the Commonwealth of Kentucky.

The plaintiffs in the present case, 96 former Micro-City Government participants, claim that LFUCG knowingly con-

cealed and facilitated the abuse. Specifically, they allege that LFUCG officials were informed of the abuse on a number of occasions, and that at least one LFUCG official actually witnessed "one of Berry's sexual outings." Nevertheless, LFUCG continued to fund Micro-City Government and is alleged to have actively concealed Berry's behavior. The plaintiffs further allege that LFUCG retained Berry as the director of the program even after LFUCG officials were aware of the abuse, and that at least one Mayor of Lexington refused to cut off funding or expose Berry because doing so would not have been "politically sustainable."

B. Procedural background

1. Guy

On October 15, 1998, the four victims who initiated the criminal charges against Berry (Keith Rene Guy Sr., Barry Lynn Demus Jr., Octavius Gillis, and Christopher Andrew Williams) filed a class action lawsuit against LFUCG, alleging that it had been both aware of and deliberately indifferent to the abuse. (This suit, *Guy et al. v. LFUCG*, No. 98-431-KSF, is hereinafter referred to as *Guy*.) But in January of 2000, before any determination was made as to the certification of the class, the *Guy* plaintiffs (with the exception of Guy himself) settled with LFUCG and joined in the defense motion to dismiss the case. On January 12, 2000, Craig Johnson and David Jones, two victims who were not among the *Guy* plaintiffs, moved to have notice of the dismissal provided to the putative class members pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. This request for notice was rejected by the district court in an April 4, 2000 order that provides the following rationale:

> Four named plaintiffs brought the instant case and Jones and Johnson moved to intervene. Considering that this lawsuit was filed in October 1998 and that there has been an enormous amount of publicity about the case,

> the Court believes that it is unlikely that many more alleged victims will come forward. Accordingly, the Court finds that the class is not so numerous that joinder is impracticable. Since the class fails to meet the prerequisites of Rule 23(a), notice to putative class members is not warranted.

As demonstrated by the later filings related to this case, however, the district court's reasoning was based on faulty assumptions. Nearly 100 putative class members came forward within two years after the district court's April 4, 2000 *Guy* order that dismissed the case. Guy, Johnson, and Jones all appealed.

As discussed in greater detail below, Johnson and Jones eventually settled. Guy's appeal, however, was considered by a prior panel of this court in *Guy v. Lexington-Fayette Urban County Gov't*, Nos. 00-5434 & 00-5569, 2003 WL 133037 (6th Cir. Jan.15, 2003) (unpublished). The panel concluded that Guy lacked standing to pursue the claim with respect to the notice requirement. Similarly, the panel concluded that the district court did not abuse its discretion in holding Guy to his earlier agreement to settle his case. It therefore affirmed the judgment of the district court in *Guy*.

2. Doe I

On May 3, 2000, Johnson, Jones, and seven other "John Does" filed a second class-action complaint that contained the same allegations as in *Guy*. (This action, *Doe v. LFUCG*, No. 00-166-KSF, is hereinafter referred to as *Doe I*.) *Doe I* was settled some two years later, on June 28, 2002. The district court again failed to provide any notice to putative class members when the parties settled, and the case was dismissed. No one, however, requested that notice be provided, and there is nothing in the record to demonstrate that the district court even considered the applicability of Rule 23(e). Johnson, Jones, and LFUCG subsequently filed a joint motion

to dismiss Johnson's and Jones's outstanding appeal in *Guy*. The motion was granted by this court in January of 2003.

3. Doe II

On September 25, 2002, 38 John Does (who are included in the present appeal) filed a third class action case, making the same allegations as in *Guy* and *Doe I*, as well as various claims under federal racketeering laws. (This action, *Doe # 1-33 v. LFUCG*, No. 02-436-JMH, is hereinafter referred to as *Doe II*.) The district court, on April 23, 2003, dismissed *Doe II* as being barred by the applicable statute of limitations.

4. Discovery and attorney fees

At a scheduling conference in *Doe II*, the district court gave both parties 30 days to conduct discovery on the issue of whether the case was barred by the applicable statute of limitations. Although the Does did not initially object to the 30-day deadline, and even failed to depose certain parties "out of professional courtesy," they subsequently moved for an extension of time to conduct more discovery on LFUCG's alleged concealment of Berry's abuse. The district court denied the motion, noting that extensive discovery had already been conducted on the concealment issue and chastising the Does for "permitt[ing] the opportunity to depose the desired parties to slip through their fingers even as they held that opportunity in their hands."

After successfully opposing the Does' motion to compel during this discovery period, LFUCG moved to recover its attorney fees on that motion. The district court held that the Does' motion to compel had not been "substantially justified," and thus awarded LFUCG $5,841.80 in attorney fees.

5. Doe III

On the same date that *Doe II* was dismissed, 58 new John Does (who are also included in the present appeal) filed still another class-action case, again repeating the same allega-

tions as in *Guy, Doe I,* and *Doe II.* (This action, *Doe # 1-44 v. LFUCG, No. 03-12-JMH,* is hereinafter referred to as *Doe III.*) *Doe III* was dismissed over a year later by the district court on November 21, 2003 as being time-barred by the applicable statute of limitations.

6. Doe v. Miller

The 58 new Does also filed a separate action, *Doe v. Miller,* No. 00-166-KSF, in which they moved to intervene in the earlier *Guy* and *Doe I* cases pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure. They contend that the lack of notice to the putative class members violated their right to the due process of law, making the judgments in those cases void. The Does' claims in *Doe v. Miller* were rejected by the district court in an order entered on October 7, 2002.

Three related appeals have arisen from this procedural morass. *Doe v. Miller* has been consolidated with *Guy v. LFUCG.* The third appeal is *Doe v. LFUCG.*

II. ANALYSIS

A. Standard of review

1. Summary judgment

The district court's grant of summary judgment is reviewed de novo. *Therma-Scan, Inc. v. Thermoscan, Inc.,* 295 F.3d 623, 629 (6th Cir.2002). Summary judgment is proper where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the district court must construe the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that

one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

2. Rule 60(b) claims

This court will review the denial of a Rule 60(b) motion under the "abuse of discretion" standard. *Kalamazoo River Study Group v. Rockwell Int'l Corp.*, 355 F.3d 574, 583 (6th Cir.2004). In order to find an abuse of discretion, we must have "a definite and firm conviction that the trial court committed a clear error of judgment." *Davis v. Jellico Comm. Hosp., Inc.*, 912 F.2d 129, 133 (6th Cir.1990) (citation omitted). Relief under Rule 60(b), moreover, is "circumscribed by public policy favoring finality of judgments and termination of litigation." *Waifersong Ltd. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir.1992).

3. Discovery, attorney fees, and class certification

Because "the scope of discovery is within the sound discretion of the trial court," *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir.1981), this court will not reverse the district court's decision unless the district has abused its discretion. *Lott v. Coyle*, 261 F.3d 594, 602 (6th Cir.2001). The same standard applies to a district court's decision regarding an award of attorney fees. *Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797, 799 (6th Cir.1996). Likewise, "[w]e review decisions [about] whether to certify a class under an 'abuse of discretion' standard." *Mayer v. Mylod*, 988 F.2d 635, 640 (6th Cir.1993).

B. The Does' motion under Rule 60(b)(4) with respect to their Rule 23(e) notice claims

By failing to provide notice to the putative class members in *Guy* and *Doe I*, the district court is alleged to have acted inconsistently with both the Rules of Civil Procedure and with basic notions of due process. The Does therefore request

that this court vacate the *Guy* and *Doe I* judgments pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure, which allows us to grant relief when an earlier "judgment is void." "A judgment is void under 60(b)(4) 'if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.'" *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 108 (6th Cir.1995) (quoting *In re Edwards*, 962 F.2d 641, 644 (7th Cir.1992)).

Rule 23(e)(1)(B) of the Federal Rules of Civil Procedure regulates the dismissal or settlement of class actions. That subsection, as it applies to the facts of this case in its formulation prior to amendment in December of 2003, provided that a "class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Fed.R.Civ.P. 23(e) 2003. As many commentators have noted, "[t]he purpose of the rule is to discourage the use of the class action device by the individual representative plaintiff to secure an unjust private settlement and to protect the absent class members against the prejudice of discontinuance." Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 8:18 (4th ed.2002).

Most courts have found that Rule 23(e)'s notice requirement applies to *putative* class members as well as to *certified* class members. *See Culver v. City of Milwaukee*, 277 F.3d 908, 914-15 (7th Cir.2002) ("[T]he context in which 'class' is used in Rule 23(e) indicates that it is not limited to a certified class. Even cases that refuse to apply Rule 23(e) to putative class actions require notice to the members of the putative class if it seems clear that otherwise their interests would be harmed."); *see also Birmingham Steel Corp. v. TVA*, 353 F.3d 1331, 1339 (11th Cir.2003) (holding that "once a district court has decertified a class, it must ensure that notification of

this action be sent to the class members, in order that the latter can be alerted that the statute of limitations has begun to run again on their individual claims"); *Crawford v. F. Hoffman-La Roche Ltd.*, 267 F.3d 760, 764-65 (8th Cir.2001) (finding that Rule 23(e) is applicable even if "a class has not yet been certified," and that "in deciding whether to allow dismissal or issue notice, the district court must consider, among other things, the possibility that potential members of the class would be prejudiced"); *Diaz v. Trust Territory of the Pac. Islands*, 876 F.2d 1401, 1408, 1409 (9th Cir.1989) (adopting "the majority approach . . . that Rule 23(e) applies before certification," and noting that "notice of dismissal protects the class from prejudice it would otherwise suffer if class members have refrained from filing suit because of knowledge of the pending class action").

Even the circuits that have not required notice to putative class members as a general rule have warned that failure to provide notice is justified only in instances free of prejudice and collusion. *See Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1315 (4th Cir.1978) ("[I]n the pre-certification settlement context of an action begun as a class action, a District Court is not automatically obligated to order notice to all putative class members under the terms of 23(e) but should, after proper inquiry, determine whether the proposed settlement and dismissal are tainted by collusion or will prejudice absent putative members with a reasonable 'reliance' expectation of the maintenance of the action for the protection of their interests."); *cf. Pearson v. Skydell*, 522 F.2d 171, 177 (5th Cir.1975) ("[W]here a court has ruled under Rule 23(c)(1) that an action cannot properly be maintained as a class action[,] the notice requirements of Rule 23(e) do not apply, at least where the dismissal and settlement of the action do not directly affect adversely the rights of individuals not before the court.").

Ultimately, the general rule adopted by most federal courts that have addressed the topic is the one articulated in Newberg:

> [M]ost requests for voluntary dismissals of representative suits are made before there has been any class ruling. Whether a voluntary dismissal in these circumstances is sought in connection with a proposed settlement of claims of the individual plaintiff only or in a nonsettlement context, most courts have stressed the need under Rule 23(e) to examine *whether any prejudice to the class will result if the dismissal of the action is allowed without class notice.*

Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11:72 (4th ed.2002) (footnotes omitted) (emphasis added); *see also Simer v. Rios*, 661 F.2d 655, 666 (7th Cir.1981) ("[W]e believe that there are serious shortcomings with a rule that would require that Rule 23(e) be applied to all settled class actions which have not been certified. . . . Therefore, rather than setting down an absolute rule[,] we choose to place discretion in the district court to assess the *prejudice to absent class members caused by the settlement*, the institutional costs of notice and a certification hearing, as well as other factors relevant to this determination.") (emphasis added). If, upon examination, the district court should find that the putative class members are likely to be prejudiced on account of a settlement or dismissal, the district court should provide Rule 23(e) notice.

LFUCG, however, argues that the "precedents from the pre-certification context do not apply because class certification was expressly denied in *Guy* and *Doe I*." This position, however, is not supported by the relevant caselaw. The Seventh Circuit, for example, explicitly considered and rejected the argument that notice is not required when class certification has been denied in the case of *Culver v. City of Milwaukee*, 277 F.3d 908 (7th Cir.2002). In *Culver*, a group

of white males brought a class action on behalf of themselves and others, claiming that they had been discriminated against by the Milwaukee police department. The district court granted the city's motion to decertify the class action on the merits. It did not, however, issue a notice of dismissal to the putative class members.

On appeal, the Seventh Circuit determined that the class action had been correctly dismissed. Nonetheless, the court found that the district court had erred in failing to give notice to the putative class members pursuant to Rule 23(e). It noted that an important justification for the application of Rule 23(e) was that "[t]he filing of a class action suit tolls the statute of limitations for all the members of the class, but when the suit is dismissed without prejudice or when class certification is denied[,] the statute resumes running for the class members." *Id.* at 914 (citations omitted). The court further concluded that, in the present case, "the statute of limitations on [the class members'] claims will run without their knowing it until it is too late." *Id.* Applying the rule that "[t]he judge's duty is to order notice unless the risk of prejudice to absent class members is nil," *id.* at 915, the court remanded the case to the district court for compliance with Rule 23(e), even though, as here, the district court had already rejected class certification. *Id.*; *see also Birmingham Steel Corp. v. TVA*, 353 F.3d 1331, 1339 (11th Cir.2003) (adopting the rule in *Culver*).

Consistent with the above caselaw, the Does argue that prejudice can be inferred from the great publicity surrounding the underlying facts of this case. They point to a line of cases standing for the proposition that prejudice can be inferred where the litigation has received widespread publicity, which increases the likelihood that putative class members have relied on the lawsuit in question. *See, e.g., In re Cardizem CD Antitrust Litig.*, No. 99-MD-1278, 2000 WL 33180833, at *6-7 (E.D.Mich. Sept.21, 2001) (unpublished) (observing that

a "reliance interest can become a danger when the filing of a class action complaint receives attention by the news media," and finding that putative class members were prejudiced in part because "[t]hese consolidated actions have received publicity, both nationally and in the areas where the suits were initially filed") (quoting *Anderberg v. Masonite Corp.*, 176 F.R.D. 682, 690 (N.D.Ga.1997)); *cf. Sikes v. American Telephone and Telegrah Co.*, 841 F.Supp. 1572, 1579-80 (S.D.Ga.1993) (finding that a lack of publicity indicates that "any absent unnotified proposed class members are not likely to have developed a 'reliance interest' in the proposed class action," and that, "[i]f no reliance interest were likely to have developed, then it would seem unnecessary" to provide notice).

Rather than adopt a per se rule, most courts considering the issue have found the level of publicity to be one of several factors appropriately considered when examining whether putative class members are likely to be prejudiced if the class-action case is dismissed without notice. *See In re Cardizem CD Antitrust Litig.*, 2000 WL 33180833, at *7 (weighing a variety of factors, including the substantial press coverage of the class-action lawsuit, in finding prejudice to the putative class to exist); *Anderberg*, 176 F.R.D. at 690 (noting that "[o]nce absent class members know of a pending litigation involving their rights, they may act in reliance upon the class action and not file their own individual suits," but also finding that the low level of publicity combined with other factors counseled against ordering notice in the case before it). We therefore decline the Does' invitation to declare that all cases where there is widespread publicity require notice to the putative class members. Instead, we adopt the general principle that the amount of publicity is simply one factor among others that a district court should take into account when considering whether putative class members are likely to be prejudiced by a settlement.

Consistent with the majority rule that a district court should order Rule 23(e) notice where the putative class is likely to be prejudiced by the dismissal or settlement of a class-action suit, we conclude that the district court below abused its discretion in not providing notice in both *Guy* and *Doe I*. One key factor supporting our conclusion is that once the abusive activity at the Micro-City Government program was thrust into the open, the local media devoted substantial coverage to the abuse. This included coverage of the *Guy* and *Doe I* lawsuits. Such public attention presumably led putative class-action members to believe that their rights were being adequately represented by the *Guy* and *Doe I* plaintiffs. Without notice that these actions had been dismissed, the putative class members were likely lulled into believing that their claims continued to be preserved.

The other significant consideration in our evaluation was that the district court in *Guy* relied on a faulty assumption in denying the notice request. The Micro-City Government program was popular and long-lasting, with thousands of participants during its 30-year lifetime. There is, moreover, evidence demonstrating that Berry had been abusing many of the participating youths throughout the length of the program. (The Does even allege that one of Berry's primary motivations in establishing the program was to give him sexual access to children.) In light of these facts, which were known at the time of *Guy*, the district court's conclusion that "it is unlikely that many more alleged victims will come forward" was objectively unreasonable. There was in fact substantial reason to believe that many more victims would come forward, as in fact actually occurred with the filing of the *Doe II* and *Doe III* lawsuits.

We therefore adopt the view of the majority of the circuits that Rule 23(e) applies in a precertification context where putative class members are likely to be prejudiced. Moreover, because of the public policy considerations involved,

we further adopt the reasoning articulated by the Seventh Circuit in *Culver* that Rule 23(e) may be applied where the district court has already rejected class certification. Under this standard, the district court in *Guy* erred in failing to provide notice to the putative class members because they were clearly prejudiced by the dismissal of that case. We decline, however, to vacate the district court's order in *Doe I*. Although the majority rule discussed above also renders questionable the district court's failure in *Doe I* to order notice to putative class members, the *Doe I* settlement between the named plaintiffs and LFUCG was contingent upon the dismissal of the class action. An action by this court vacating the district court's order in *Doe I* would therefore disturb the settlement. On the other hand, vacating the *Guy* order reaches the equitable result of allowing the Does to go forward with their case while preserving the settlement reached by the *Doe I* parties.

C. Statutes of limitation (discovery rule and equitable-tolling analysis)

Statutes of limitation that cover the acts alleged by the Does range from one year to six years. Because *Guy* will be reopened, however, the various statutes of limitation will be considered as tolled from and after the filing of *Guy*. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983) ("[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.") (citation omitted). We therefore need not address the discovery-rule and equitable-tolling arguments presented by the Does.

D. The Rule 60(b)(2) and (3) motions with respect to *Guy* and *Doe I*

The Does further claim that LFUCG and the plaintiffs' counsel in *Guy* and *Doe I* took actions that constituted fraud, collusion, misrepresentation, and misconduct, meriting relief under Rules 60(b)(2) and 60(b)(3) of the Federal Rules of Civil Procedure. Because *Guy* will be reopened on the basis of Rule 60(b)(4), however, we have no need to address these alternative claims for relief.

E. Whether the statutes of limitation were tolled by *Doe I*

LFUCG contends that "*Crown Cork* tolling applies only to the first class action," and therefore argues that the various statutes of limitation were not tolled when *Doe I* was filed. Because the *Guy* class action will be reopened for the reasons set forth in Part II.B. above, we need not address the question of whether the statutes of limitation for *Doe II* and *Doe III* were tolled by the filing of *Doe I*.

F. 30-day discovery period

A district court's decision to limit discovery will generally be upheld unless the decision is deemed to be "an abuse of discretion resulting in substantial prejudice." *Hahn v. Star Bank*, 190 F.3d 708, 719 (6th Cir.1999). The circumstances surrounding the district court's decision here to deny an extension of time beyond the 30 days of discovery it granted for the statute-of-limitation issue suggest that the district court did not abuse its discretion. Most tellingly, a portion of the evidence that the Does claim to have been denied the opportunity to introduce was lost because of their own lack of diligence. As the court noted, "the Plaintiffs' counsel's failure to procure the depositions of certain parties out of their own perceived 'professional courtesy' in the face of a deadline of which all parties were aware . . . [is] the Plaintiffs' own loss." The district court's decision not to reward

the Does for "permit[ting] the opportunity to depose the desired parties to slip through their fingers even as they held that opportunity in their hands" was well within the "broad discretion" that a district court has over the scope of discovery. *See Bush v. Dictaphone Corp.*, 161 F.3d 363, 367 (6th Cir.1998). Even if this were not the case, the reopening of *Guy* makes this issue moot. We therefore decline to hold that the district court abused its discretion by limiting discovery on this issue to 30 days.

G. Attorney fees relating to the Does' motion to compel

1. Whether the motion was substantially justified

Rule 37(a)(4)(B) of the Federal Rules of Civil Procedure provides that if a motion to compel discovery is denied,

> the court . . . shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

A motion is "substantially justified" if it raises an issue about which "there is a genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action." *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988) (citations and quotation marks omitted). As noted by the Supreme Court, "the one [connotation] most naturally conveyed by the phrase before us here ["substantially justified"] is not 'justified to a high degree,' but rather 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Id.*

This circuit has adopted a four-factor test to determine whether a district court's decision to impose sanctions under Rule 37 amounts to an abuse of discretion:

> The first factor is whether the party's failure to cooperate in discovery is due to willfulness, bad faith, or fault; the second factor is whether the adversary was prejudiced by the party's failure to cooperate in discovery; the third factor is whether the party was warned that failure to cooperate could lead to the sanction; and the fourth factor in regard to a dismissal is whether less drastic sanctions were first imposed or considered.

Freeland v. Amigo, 103 F.3d 1271, 1277 (6th Cir.1997). The first *Freeland* factor appears to cut in the Does' favor because the motion to compel raised an issue about which reasonable people could differ. As noted by the Does, LFUCG produced thousands of pages of the documents requested by the motion between the time that the motion was filed and the time that the district court granted attorney fees to LFUCG. This strongly suggests that the Does' request for these documents was plausible on its face.

Likewise, LFUCG could not have been "prejudiced by the [Does'] failure to cooperate in discovery," *Freeland*, 103 F.3d at 1277, if the motion was substantially justified. The third factor also weighs in the Does' favor, because the district court did not warn them that a motion to compel could result in attorney fees being assessed against them. *See id.* Finally, because the district court did not dismiss the case, the fourth *Freeland* factor is not applicable to the present circumstances. *See id.*

2. The Does' citation of Harding v. Dana Transport

Central to the district court's imposition of sanctions was its discussion of the deficiencies in the Does' argument for the discovery of materials that LFUCG claimed were protected by the attorney-client privilege. Although the Does

may have been wrong on this issue, the district court's sweeping statement that the authority cited by the Does "was not germane in any way to the issue before the Court" was overbroad. The case cited by the Does, *Harding v. Dana Transport, Inc.*, 914 F.Supp. 1084 (D.N.J.1996), involved the scope of the attorney-client privilege in the context of discovery, and ultimately held that the privilege had been waived with regard to the information at issue. *Id.* at 1103.

Regardless of whether the ultimate issue addressed in *Harding* was identical to the issue raised by the Does, *Harding* clearly provides support for a party seeking to compel discovery of information that the opposing party claims is protected by the attorney-client privilege. *See id.* at 1089-90, 1102 (holding that "[a] party or person seeking to obtain a protective order on the basis of an asserted privilege bears the burden of establishing the applicability of a privilege to the information sought," and noting that "there is no general prohibition against obtaining the deposition of adverse counsel regarding relevant, non-privileged information") (citation omitted).

In sum, we conclude that the district court abused its discretion by granting attorney fees in regard to a motion that, even if properly denied, was substantially justified. We therefore vacate the district court's order awarding attorney fees to LFUCG.

H. Class certification

The district court's denial of class certification was based on its holding that the denial of certification in *Doe I* collaterally estopped consideration of this issue in *Doe II* and *Doe III*. *See Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) (holding that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a

party to the prior litigation"); *Hammer v. INS*, 195 F.3d 836, 840 (6th Cir.1999) (applying a five-factor test to determine whether collateral estoppel applies, with one of the requirements being that "the issue was actually litigated and decided in the prior action"). Because *Guy* is being reopened, however, there is no longer a final judgment determining the issue of class certification. We therefore remand the issue of class certification to the district court for reconsideration on the merits.

III. CONCLUSION

For all of the reasons set forth above, we REVERSE the judgment of the district court with respect to *Guy* and the award of attorney fees to LFUCG in *Doe II*, and REMAND the case for further proceedings consistent with this opinion. The remaining issues in these consolidated appeals are DISMISSED as moot.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

[Filed Nov. 21, 2003]

CIVIL ACTION NO. 03-12-JMH

JOHN DOE #1, *et al.*,
PLAINTIFFS,

v.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, *et al.*,
DEFENDANTS.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendants' motion for summary judgment [Record No. 22]. Plaintiffs have responded [Record No. 23], and Defendants have replied [Record No. 24]. The Court being sufficiently advised, this matter is now ripe for decision.

FACTUAL BACKGROUND

Plaintiffs are former participants in programs sponsored, funded, conducted, or approved by the Lexington-Fayette Urban County Government ("LFUCG") through an organization called Micro-City Government, Inc. ("Micro-City Government"), founded by Ronald Berry in 1969 as an enrichment program for Lexington's inner-city youth.[1]

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[1] The Court understands from Defendants' memorandum in support of their motion for summary judgment on the statutes of limitation in this matter, that "Jane Doe #14" does not exist. Apparently, Plaintiffs' counsel has indicated that such an individual was listed in this matter as the result

Micro-City Government was substantially funded by the Lexington-Fayette Urban County Government ("LFUCG") and often served to implement programs for or on behalf of LFUCG. During their participation in the program, Plaintiffs allege that they were sexually molested and encouraged to use alcohol and drugs by Ronald Berry and others.

Seeking remedy for injuries allegedly inflicted during and as a result of participation in the Micro-City Government program, *Guy v. LFUCG* (hereinafter, "*Guy* Litigation") was filed as a class action in the Eastern District of Kentucky on October 15, 1998. *Guy v. LFUCG*, Civil Action No. 98-431 (E.D.Ky., Lexington Division). On February 28, 2000 that case was settled on behalf of all named plaintiffs and the matter dismissed, effectively terminating the class action. Subsequently, on April 4, 2000, the Court declined to permit theretofore unnamed putative class members to intervene in the matter and object to the settlement or to require notice to formerly putative class members regarding the settlement. On May 3, 2000, a second class action ("*Doe I*") was filed in the same Court, again seeking relief for injuries allegedly inflicted during and as a result of participation in the Micro-City Government program. *Doe v. LFUCG*, Civil Action No. 00-166 (E.D.Ky., Lexington Division). Class certification was denied and the matter was settled on behalf of the named Plaintiffs by the Court's order of June 28, 2002. On September 25, 2002, a third case ("*Doe II*") was filed, once again seeking relief for injuries allegedly inflicted during and as a result of participation in the Micro-City Government program. *Doe v. LFUCG*, Civil Action No. 02-439 (E.D.Ky., Lexington Division). Class certification was denied on collat-

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of an error in which one of the plaintiffs was double-counted. Plaintiffs' counsel has not averred otherwise. Accordingly, the Court shall construe Defendants' statement as a motion to amend the pleadings under Fed. R. Civ. P. 15 and order that the caption and the pleadings in this matter are amended to reflect the fact that no such plaintiff exists.

eral estoppel grounds on January 9, 2003, and the matter was ultimately dismissed by the Court's orders of April 5, April 25, and August 22, 2003, as the Court determined that all claims asserted by the *Doe II* plaintiffs were time barred.

The present matter, filed on January 13, 2003, is the fourth installment in this series of cases. On April 15, 2003, this Court ordered the parties to participate in limited discovery and briefing on the applicable statutes of limitations. On June 5, 2003, Plaintiffs filed a stipulation stating that no plaintiff was abused after January 12, 2002, more than a year prior to the filing of this lawsuit nor was any plaintiff abused "after August 29, 1995 in a manner that would permit suit under [Count Ten.]" [P1. Stip. at ¶2.] Following several extensions of the deadline for discovery, forty-three of the plaintiffs served answers to Defendants' interrogatories. Fourteen other plaintiffs did not respond to those interrogatories within that time frame and no extensions of time for their responses have been sought.[2] The latest date of alleged abuse indicated in this matter is claimed by John Doe #19, alleging that he was abused while participating in the program sometime in 1997.

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[2] Fed. R. Civ. P. 37(b)(2) provides that:

> If a party . . . fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> [. . .]
>
> (C) An order . . . dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Insofar as the fourteen plaintiffs have failed to respond to specific interrogatories as ordered by the Court, the Court has determined that all claims of John Does #1, 5, 15, 21, 23, 27, 31, 32, 34, 35, 37, and 40, and Jane Does #1 and 10, shall be dismissed with prejudice.

In their motion for summary judgment, Defendants argue that the federal causes of action set out in Plaintiffs' Complaint are time barred by the applicable statutes of limitations and request that this Court dismiss these claims. As set forth below, the Court agrees and these federal claims shall be dismissed.

APPLICABLE STANDARD OF REVIEW

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." The moving party may discharge its burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The nonmoving party, which in this case is the plaintiff, "cannot rest on [her] pleadings," and must show the Court that "there is a genuine issue for trial." *Hall v. Tollett*, 128 F.3d 418, 422 (6th Cir. 1997). In considering a motion for summary judgment the court must construe the facts in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

DISCUSSION

A. 42 U.S.C. § 13981 IS UNCONSTITUTIONAL PER THE UNITED STATE SUPREME COURT'S DECISION IN *UNITED STATES V. MORRISON*; CLAIM ALLEGED IN COUNT THREE SHALL BE DISMISSED

As an initial matter, the Court notes that Plaintiffs attempt to state a claim under 42 U.S.C. § 13981 in Count Three. The United States Supreme Court determined § 13981 to be unconstitutional in the case of *United States v. Morrison*. *United States v. Morrison*, 529 U.S. 598 (2000) (Congress had no power under either the Commerce Clause or § 5 of the Fourteenth Amendment to enact § 13981). Accordingly, this

Court shall not consider the claims alleged thereunder, and they shall be dismissed.

B. PLAINTIFFS' CLAIMS FOR VIOLATIONS OF 42 U.S.C. § 2000(E), *ET SEQ.*, AS ALLEGED IN COUNT EIGHT ARE BARRED BY THEIR FAILURE TO PURSUE REMEDIES WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS PRESCRIBED BY STATUTE

In Count Eight, Plaintiffs complain of a hostile work environment in violation of 42 U.S.C. § 2000(e), *et seq.*, due to the "abuses and enslavements" endured "in order to receive wages or paychecks from the Defendant employers of African-American children." [Complaint ¶182.] While Plaintiff prays for relief under 42 U.S.C. § 2000e-5(e) pursuant to 42 U.S.C. §§ 1986 and 1988, the Court notes that the enforcement provisions in 42 U.S.C. § 2000e-5(e) provide that:

> A charge under this section shall be filed [with the Equal Employment Opportunity Commission (EEOC)] within one hundred and eighty days after the alleged unlawful employment practice occurred . . .

42 U.S.C. § 2000e-5(e)(1). A plaintiff may institute his or her own civil action within 90 days of receiving a right to sue letter from the EEOC. 42 U.S.C. § 2000e-5(f)(1)(A). It does not appear that Plaintiffs in the instant matter have ever filed a complaint with the EEOC, let alone within 180 days of the employment actions giving rise to their individual claims of discrimination and hostile work environment, nor was a right to sue letter ever issued. Accordingly, Plaintiffs' claims for denial of equal employment opportunities as alleged in Count Eight are barred, in the first instance, by their failure to pursue remedies in the manner prescribed by the statute. *See EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836, 839 (6th Cir. 1994) (citing *Allen v. United States Steel Corp.*, 665 F.2d 689, 695 (5th Cir. 1982)).

C. STATUTES OF LIMITATIONS

The parties have briefed the issue of the statutes of limitations for the federal causes of action raised by Plaintiffs, and the Court shall first consider each cause of action alleged in turn in order to determine what statute of limitations applies to each federal cause of action alleged by Plaintiffs.

(1) Claims Alleged in Counts One, Two, Seven, Nine, and Eleven of Plaintiffs' Complaint Pursuant to 20 U.S.C. § 1687(2)(A) and 42 U.S.C. §§ 1981, 1983, 1985, and 1986 Are Subject to a One Year Statute of Limitations

42 U.S.C. §§ 1981, 1983,[3] 1985, and 20 U.S.C. § 1687(2)(A),[4] under which Plaintiffs complain in Counts

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[3] The Court notes that Plaintiffs' Complaint actually suggests that relief would be proper under "28 U.S.C. § 1983." Noting that 28 U.S.C. § 1983 would be part of that body of law addressing the judiciary and judicial procedure and, more specifically, pending actions and judgments, the Court shall proceed as the parties have in their subsequent proceedings to presume that Plaintiffs intended to state that such relief would be proper under 42 U.S.C. § 1983.

[4] This portion of Title IX defines "program or activity" and "program" to mean all the operations of "a college, university or other postsecondary institution, or a public system of higher education." 20 U.S.C. § 1687(2)(A). Given the facts of this case and the nature of the Micro-City Government program in which the Plaintiffs participated, the Court is somewhat puzzled by Plaintiffs' statement that their claims Title IX claims under 20 U.S.C. §§ 1681-1688 are somehow pursuant to § 1687(2)(A). In any event, the Court notes that there is an implied private right of action under Title IX in certain circumstances. *See, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999) (private damages action could lie against school board in case of student-on-student harassment where funding recipient acted with deliberate indifference to known acts of harassment in its programs or activities). Notwithstanding whether or not Plaintiffs have properly stated a claim such that an implied private right of action exists in the present matter, the Court finds for the reasons stated in this opinion that, even if such a claim could be stated, it would be barred by the

One, Two, Seven, Nine, and Eleven, do not provide their own statutes of limitations. Where a federal statute fails to include a statute of limitations, federal courts must adopt the most analogous state statute in determining the appropriate statute of limitations. For actions under 42 U.S.C. §§ 1981, 1983, and 1985 and 20 U.S.C. § 1687 (2)(A) , that statute of limitations is found in the "general or residual statute for personal injury actions. *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987) (§ 1981); *Wilson v. Garcia*, 471 U.S. 261 (1985) (§ 1983 claims); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 729 (6th Cir. 1996) (Title IX); *Boatright v. American Academy of Actuaries*, 2000 WL 303020, *2 (6th Cir. 2000) (§ 1985); *McWhorter v. Miller*, 221 F.3d 1335, 2000 WL 924597, *2 (6th Cir. 2000) (§ 1985). The Sixth Circuit Court of Appeals has followed the United States Supreme Court's determination in *Wilson* that where a state maintains multiple personal injury statutes of limitations for personal injury matters that the most analogous general personal injury statute of limitation still controls. *Deaton v. City of Dayton*, 14 F.3d 600 (6th Cir. 1993).

The appropriate general personal injury statute of limitations in Kentucky measures one year.[5] KY. REV. STAT. § 413.140(1); *Bedford v. University of Louisville School of Medicine*, 887 F.2d 1086 (6th Cir. 1989). Accordingly, a one year statute of limitations applies to the causes of action alleged under 42 U.S.C. §§ 1981, 1983, 1985 and 20 U.S.C. § 1687(2)(A).

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running of the applicable statute of limitations and will inquire no further into this matter.

[5] KY. REV. STAT. § 413.140 provides that:

(1) The following actions shall be commenced within one (1) year after the cause of action accrued:

(a) An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice, or servant . . .

KY. REV. STAT. § 413.140(1)(a).

42 U.S.C. § 1986 provides that:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured . . .
>
> . . . But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

42 U.S.C. § 1986. Thus, by statute, Plaintiffs' claims under § 1986 are subject to a one-year statute of limitations.

(2) RICO CLAIMS ALLEGED IN COUNT SIX ARE GOVERNED BY A FOUR YEAR STATUTE OF LIMITATIONS

In Count Six, Plaintiffs allege that the actions complained of constitute a pattern of racketeering activity over the course of three decades in violation of 18 U.S.C. §§ 1961(1)(B) and 1962(b), (c), and (d) through Defendants' alleged conspiracy with Berry and with each other using their "individual offices and/or positions of authority" in order to commit a variety of alleged predicate acts. [Complaint ¶174.] The limitations period for such a RICO claims [sic] is four years. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143 (1987); *Caproni v. Prudential Securities, Inc.*, 15 F.3d 614, 619 (6th Cir. 1994).

(3) 18 U.S.C. § 2255 PROVIDES SIX YEAR STATUTE OF LIMITATIONS FOR CLAIMS ALLEGED IN COUNT TEN FOR VIOLATION OF 18 U.S.C. §§ 2241, 2242, 2245, 2251, 2251 [sic], 2252, AND 2258

18 U.S.C. § 2255 provides for the civil remedy of personal injuries under §§ 2241, 2242, 2245, 2251, 2251 [sic] , 2252, and 2258 with the following limitation:

> Any action commenced under this section shall be barred unless the complaint is filed within six years after

> the right of action first accrues or in the case of a person under a legal disability, not later than three years after the disability.

18 U.S.C. § 2255(b).

D. *AMERICAN PIPE* PROVIDES FOR TOLLING OF APPLICABLE STATUTE OF LIMITATIONS FOR ALL MEMBERS OF PUTATIVE CLASS IN *GUY* LITIGATION UNTIL CLASS CERTIFICATION WAS DENIED OR CASE WAS DISMISSED

In *American Pipe & Const. Co. v. Utah*, the Supreme Court held that:

> [T]he rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.

American Pipe & Const. Co., 414 U.S. 538, 554 (1974). Once tolled, the statute of limitations remains tolled for all putative class members until class certification is denied or the case is dismissed. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983).

It has also been noted "[t]he tolling rule of *American Pipe* is a generous one, inviting abuse[,]" and it "should not be read . . . as leaving a plaintiff free to raise different or peripheral claims following denial of class status." *Crown, Cork & Seal Co.*, 462 U.S. at 354 (Powell, J., concurring). Thus, it is taught in the Sixth Circuit that "[u]nder *American Pipe*, the statute of limitations for putative class members of the original class is tolled only for substantive claims that were raised, or could have been raised, in the initial complaint." *Weston v. AmeriBank*, 265 F.3d 366, 368-369 (6th Cir. 2001).[6]

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[6] In *Weston*, a plaintiff's claim was barred by federal statute's one-year statute of limitations where the initial complaint in a prior class action had

Further, *American Pipe* tolling "was not intended to be applied to suspend the running of statutes of limitations for class action suits filed after a definitive determination of class certification; such an application of the rule would be inimical to the purposes behind statutes of limitations and the class action procedure." *Korwek v. Hunt*, 827 F.2d 874, 879 (2nd Cir. 1987). Thus, a class action can toll the statute of limitations only once, and class members cannot "piggyback" tolling periods by filing successive class actions, motions for reconsideration of prior class rulings, or motions to expand the class. *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988); *see Korwek*, 827 F.2d at 879; *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985) ("Plaintiffs have no authority for their contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely. . . ."); *Piney Woods County Life School v. Shell Oil Company*, 170 F. Supp. 2d 675, 687 (S.D. Miss. 1999).

Thus, with the filing of the *Guy* Litigation as a class action on October 15, 1998 in the Eastern District of Kentucky on behalf of all similarly-situated parties against the LFUCG and many of the same Defendants named in the present action, and seeking damages for injuries resulting from the alleged

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alleged solely state law violations and the state circuit court denied the plaintiff's request to amend that complaint to assert the federal claim alleged in subsequent suit because the applicable statute of limitations had run when initial complaint in prior class action was filed. *Weston v. AmeriBank*, 265 F.3d 366, 368-369 (6th Cir. 2001). As the state law claims raised in the earlier class action were thus separate and distinct from federal claim, the earlier class action did not toll the federal statute's one-year statute of limitations because earlier plaintiffs could not have included the claim in their initial complaint because their complaint was filed after the one-year statute of limitations had run. *Id.* Similarly, in this matter, the statutes of limitations for several of Plaintiffs' claims had expired prior to the commencement of the *Guy* litigation and those statutes of limitations will not be tolled during the pendency thereof.

promotion, financing, and condoning of Berry's actions over his thirty-year tenure as the leader of Micro-City, any unexpired statutes of limitations on Plaintiffs' claims were tolled. On February 28, 2000, the Court approved a settlement as it related to the remaining class representative and entered an order of dismissal. As the case was dismissed and the class not certified, the tolling of the unexpired statutes of limitations on Plaintiffs' claims ended.[7] *See Crown, Cork & Seal Co.*, 462 U.S. at 353-54.

On May 3, 2000, a second class action law suit, *Doe I*, was filed, alleging much of the same conduct on the part of Defendants. On June 28, 2002, the District Court entered an order approving a settlement for the named parties and denying class certification. The third in this series of cases, *Doe II*, was not dismissed *in toto* until August 22, 2003, although class certification had already been denied on collateral estoppel grounds on January 9, 2003. Certainly, any unexpired statutes of limitations were tolled during the pendency of *Doe I*. However, the law does not provide for a second or third tolling period. As described above, Plaintiffs may not piggy-

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[7] Plaintiffs suggest the 1998 addition of Rule 23(f), allowing permissive interlocutory appeal of class certification determinations would properly require the continued tolling of a statute of limitations during the pendency of an appeal. [Response at 28 (*citing Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374 (11th Cir. 1998).] In *Armstrong*, cited by Plaintiffs, the Eleventh Circuit specifically held that tolling ends upon the denial of class certification by the trial court while stating that if then-pending Rule 23(f) were adopted, the court *might* consider allowing tolling to continue during the pendency of *interlocutory* appeals pursuant to Rule 23(f). *Armstrong*, 138 F.3d at 1389 n. 35. The *Armstrong* court indicated no intention to consider further tolling outside the narrow exception for interlocutory appeals. In fact, it appears that no Circuit has adopted such an approach. As in *Doe II*, this Court does not see the wisdom of using the instant matter to craft such an approach, considering that no interlocutory appeals would have been possible in the earlier failed class actions as denial of class certification was not realized until such time as final judgment was entered.

back successive class actions to toll the unexpired statutes of limitations applicable to their claims. *Andrews*, 851 F.2d at 149; *see Korwek*, 827 F.2d at 879; *Salazar-Calderon*, 765 F.2d at 1351.

Accordingly, the Court finds that tolling of any unexpired statutes of limitations took place during the pendency of the *Guy* Litigation, from October 15, 1998 to February 28, 2000. In total, any unexpired statute of limitations was tolled for 501 days, approximately one year and five months, by the pendency of that litigation.

E. OTHER TOLLING DOCTRINES

Generally, federal courts borrow a state's tolling rules unless applying the tolling rules would defeat the goals of the federal statute at issue. *Board of Regents v. Tomanio*, 446 U.S. 478, 484-486 (1980); *Hardin v. Straub*, 490 U.S. 536, 539 (1989). The Plaintiffs rely on the doctrines of equitable estoppel (also known as fraudulent concealment) and equitable tolling in their response to Defendants' motion for summary judgment. Accordingly, the Court shall consider each in turn.

(1) EQUITABLE ESTOPPEL

Kentucky has codified the doctrine of equitable estoppel or fraudulent concealment through the enactment of KY. REV. STAT. § 413.190(2). *See Munday v. Mayfair Diagnostic Lab.*, 831 S.W.2d 912, 914-15 (Ky. 1992) (the statute "is simply a recognition in law of an equitable estoppel . . . to prevent fraudulent or inequitable application of a statute of limitations"). The statute provides that:

> [T]he time of the continuance of the [defendant's] . . . obstruction [of the prosecution of the action] shall not be computed as any part of the period within which the action shall be commenced.

KY. REV. STAT. § 413.190(2). Once the "obstruction" is removed, a plaintiff has a duty to exercise reasonable dili-

gence in pursuing his or her claims. *See Cuppy v. Gen. Accident Fire & Life Assurance Corp.*, 378 S.W.2d 629, 630-31 (Ky. 1964). In order to establish fraudulent concealment:

> Defendant's action must have prevented Plaintiff from inquiring into the action, or eluded Plaintiff's investigation, or otherwise mislead the Plaintiff.

Hazel v. General Motors Corp., 863 F.Supp. 435, 439 (W.D. Ky. 1994) (*citing Burke v. Blair*, 349 S.W.2d 836, 837 (Ky. 1961)). However, the plaintiff is always "under the duty to exercise reasonable care and diligence to discover whether he has a viable legal claim," and any fact that should arouse his suspicion is equivalent to "actual knowledge of his entire claim." *Id.* (*quoting Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975)).

Plaintiffs argue that the fact that various individuals associated with the LFUCG were unaware of any involvement on the part of LFUCG with the alleged abuse of Micro-City Government participants by Berry somehow indicates that they could not have been aware of the same. The Court remarks that Plaintiffs argument is strikingly similar to that made with regard to accrual of the claims and discussed below. To the extent that the Court believes that Plaintiffs have not entirely confused the notions of claim accrual and equitable estoppel, the Court shall consider this argument.

Plaintiffs concede that the general nature of the allegations against the Defendants was public knowledge by no later than October 15, 1998, with the filing of the *Guy* Litigation. This is to say that undoubtedly the Plaintiffs were on notice of the wrongs alleged from that time forward. However, the Court is not entirely convinced that such an obstruction existed prior to the filing of the *Guy* Litigation. As discussed below, in the analysis of claim accrual, it would not have been necessary for the Plaintiffs to possess every single detail about their claims that the Defendants could possibly have been with-

holding in order for their claims to have accrued and been discovered. *See Hazel v. Gen. Motors Corp.*, 863 F. Supp. 435, 439 (W.D. Ky. 1994), *aff'd in pertinent part* 83 F.3d 422 (6th Cir. 1996) (holding that concealment of evidence of defect in gas tank design by defendant did not justify tolling for fraudulent concealment, because not enough information had been concealed to prevent plaintiff from assessing whether he should file complaint).

Therefore, as in *Doe II*, Plaintiffs' reliance on *Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286 (Ky. App. 1998) is misplaced. Applying KY. REV. STAT. § 413.190, the *Secter* court stated:

> Obstruction might also occur where a defendant conceals a plaintiff's cause of action so that it could not be discovered by the exercise of ordinary diligence on the plaintiff's part.

Id. at 290 (*quoting Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295, 297 (Ky. App. 1993)). Similarly, *Jarrett v. Kassel*, 972 F.2d 1415 (6th Cir. 1992), merely held that the due diligence of a class representative (or the attorney for the class) in discovering any additional related claims of the class could be attributed to the entire class for tolling purposes. Both of these cases involved a plaintiff (or his representative) who had demonstrated the required due diligence necessary to justify application of tolling for fraudulent concealment.

In its response to Defendants' motion for summary judgment, Plaintiffs decry this Court's decision on the same issue in *Doe II*. Specifically, Plaintiffs state:

> This Court, in its decision in *Doe II* . . . , concluded that each of the Plaintiffs "knew or should have known" that the LFUCG was directly involved. The Court, however, failed to mention how the Plaintiffs could have possibly "known or should have known" that the LFUCG was even connected with Mr. Berry and Micro-City Govern-

> ment, much less that the LFUCG knew that Berry was engaging in inappropriate sexual molestation of children under his control! Instead, the Court simply stated that as soon as the Plaintiffs were raped by Mr. Berry, they knew or should have known that the LFUCG (1) was connected with Mr. Berry, and (2) knew or should have known that the abuse was going on.

[Response at 17 (emphasis in original omitted).]

All things considered, the Court remains convinced that the Plaintiffs were sufficiently aware of facts that should have aroused their suspicion of the claims against Defendants at the time of their injuries. Even if the Defendants were involved in the machinations alleged by Plaintiffs, the injuries alleged could only come to fruition with the acts of Berry. The Court again remarks that the LFUCG's relationship with the Micro-City Government program was not a hidden fact. Insofar as Plaintiffs were injured during their participation in that program and no doubt aware of the injuries caused by Berry's actions at that time, the onus was placed on them to "exercise reasonable care and diligence to discover whether [there was] a viable legal claim" arising from those injuries could be sustained and against whom. As before, there is no indication that Plaintiffs exercised any diligence, ordinary or otherwise, in order to uncover the source of their injury during the unexpired statutes of limitations for their claims. Statements concerning the failure of other parties to discover the same still will not substitute for their own duty to safeguard and secure their own legal claims. Rather the court is left to ask wherein lies the obstruction if Plaintiffs never inquired into the action so as to be thwarted or otherwise misled? *See Hazel*, 863 F.Supp. at 439. Again, equitable estoppel is not merited on these grounds.

This Court is also of the opinion that Plaintiffs are not entitled to equitable estoppel based on alleged misrepresentations by Hon. Michael Baker, during his representation of the Defen-

dants in the *Guy* Litigation. The Plaintiffs refer to a brief filed therein by Defendants in opposition to the intervenors' motion to intervene as class representatives. Defendants allege that Hon. Baker represented that "no individual claims would be harmed" and made express assurances" [sic] that an order denying class certification "would have no effect on any claims" brought by the intervenors. [Pl. Mem. Opp., at 29-30.]

Hon. Baker's statements did not create an "obstruction" of the prosecution of the action as required for the application of collateral estoppel by KY. REV. STAT. § 413.190(2). Plaintiffs' assertions that the Court relied on these alleged representations in denying the intervention or that the Plaintiffs relied in bringing their claims outside the limitations period are unreasonable at best and in bad faith at worst. *See Adams v. Ison*, 249 S.W.2d 791, 793 (Ky. 1952) ("the representation or conduct must have been relied upon reasonably and in good faith and have resulted in prejudice from having refrained from commencing his action within the limitation period.").

As a practical matter, the dismissal and settlement of *Guy* had "no preclusive effect" on the substantive claims of individuals because a class had not been certified. Further, the Court notes that "the proposed intervenors [were] free to plead class action allegations" in a subsequent lawsuit and did so in *Doe I*. The same parties and other potential plaintiffs could have also filed individual suits against Defendants within the window created by the accrual of their claims and the running of the statute of limitations, including any applicable tolling for the pendency of the failed *Guy* Litigation class action. Defense counsel did not represent that any individual or class claims subsequently brought by the intervenors would necessarily be valid or immune from attack on the basis of a defense based on the statute of limitations.

This is to say that the imperative to timely file a new complaint in this matter was clearly on Plaintiffs and their counsel, notwithstanding their current protestations, under their

continuing "duty to exercise reasonable care and diligence." *Hazel*, 863 F.Supp. at 439. Defendants, through their counsel, cannot be charged with Plaintiffs' or Plaintiffs' counsel's failure to properly understand the law and calculate the statute of limitations.

(2) EQUITABLE TOLLING

Limitations periods are "customarily subject to 'equitable tolling,'" unless tolling would be "inconsistent with the text of the relevant statute," *Young v. U.S.*, 122 S.Ct. 1036, 1040 (2002) (*quoting Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990); *United States v. Beggerly*, 524 U.S. 38, 48 (1998)). However:

> Equitable tolling is available in suits only where notice is insufficient or "where the claimant has actively pursued his judicial remedies by filing a defective pleading [during the statutory period] or where he has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."

Shisler v. U.S., 199 F.3d 848, 852 (6th Cir. 1999) (*citing Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 90 (1990)).

Plaintiffs' argument for equitable tolling centers on the circumstances of the settlement and denial of class certification in the *Guy* Litigation. In approving the settlement of the named plaintiffs' claims on February 4 and 28, 2000, the *Guy* court determined not to certify the class and denied a motion to intervene by two intervening plaintiffs seeking class certification and made it clear that the unsuccessful intervenors were free to pursue their individual claims. On April 4, 2000, the *Guy* court denied the intervenors' request that notice be sent to all absent class members to provide them an opportunity to object to the settlement as the *Guy* court had already denied the class certification prior to the settlement. *See Muntz v. Ohio Screw Products*, 61 F.R.D. 396 (N.D. Ohio 1973).

Plaintiffs argue that any tardy filing should be excused because of those actions taken by Defendants during the *Guy* litigation and *Doe I*. Specifically, Plaintiffs allege intentional efforts to dismiss the class actions without proper notice, coupled with the alleged lack of proper notice to the Plaintiffs of their individual claims against the Defendants, resulting in a lack of actual notice of the plaintiffs' rights and obligations. [Pl. Response at 34.] The Court, as in *Doe II*, agrees with Defendants that Plaintiffs' arguments attempt to impose upon the *Guy* and *Doe I* courts duties that do not exist under Rule 23. No notice of a dismissal or settlement to former putative class members is required if there has been a judicial denial of class certification.[8] *See Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401, 1406 (9th Cir. 1989); *Rineheart v. Ciba-Geigy Corp.*, 190 F.R.D. 197, 200 (M.D. La. 1999). As noted in *Dyer v. Publix Super Markets, Inc.*:

> [O]nce class certification is denied, no class exists and Fed.R.Civ.P. 23 no longer applies. Clearly, Rule 23(d)(2), which begins 'in the conduct of actions *to which this rule applies*,' became inapplicable upon entry of the Order denying class certification. The Court, thus, finds that it has no authority under Fed.R.Civ.P. 23(d)(2) to enter the requested order [requiring notice of denial of certification].

Dyer v. Publix Super Markets, Inc., 2000 U.S. Dist. LEXIS 7977 (M.D. Fla. 2000) (*referencing similar holdings* in

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[8] The cases cited by Plaintiffs do not suggest that they were entitled to notice of the settlement and dismissal of *Guy* and *Doe I*. Rather, those cases support the proposition that a court should provide absent class members with notice of a settlement that occurs *pre-certification*—not notice of a settlement and dismissal after class certification has been denied. *See Gupta v. Penn Jersey Corp.*, 582 F.Supp. 1058, 1060 (E.D. Pa. 1984); *Rothman v. Gould*, 52 F.R.D. 494 (S.D.N.Y. 1971) (class notice of settlement ordered where class determination had not yet been made and class counsel appeared to have abandoned class interests); *Diaz v. Trust Territory of the Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989).

Marian Bank v. Electronic Payment Services, Inc., 1999 U.S.Dist. LEXIS 3097 (D. Del. 1999); *Weisman v. Darneille*, 78 F.R.D. 671 (S.D.N.Y. 1978).

When, as in *Guy* and *Doe I*, the court determines that a matter shall not proceed as a class action, Rule 23 does not require the court to take additional steps to protect the interests of absent class members. Rather, after a denial of class certification, *American Pipe* tolling allows individual members of the putative class "to file their own suits or to intervene as plaintiffs in the pending action." *Crown, Cork*, 462 U.S. at 354. "[O]nce the district court enters an order denying class certification, the excluded putative class members are put on notice that they must act independently to protect their rights . . . ." *Piney Woods Country Life School*, 170 F.Supp.2d at 685. Thus, the Plaintiffs' claim of an entitlement to receive a separate court-ordered notice of the settlement and dismissal of *Guy* and *Doe I* after the denial of class certification is neither contemplated by *American Pipe* tolling nor is it a requirement of Rule 23. This Court is of the opinion that, as Plaintiffs were not entitled to notice of settlement or dismissal because class certification had been denied, they may not now seek equitable tolling on that premise.

Plaintiffs again suggest that dismissal and settlement of *Guy* and *Doe I* were tainted by "collusion," but the Court still finds nothing collusive in how these cases were resolved. Looking again, as in *Doe II*, to the agreement to settle *Doe I*, the parties stipulated (1) that the Court would need to reach a decision on class certification and (2) that if the Court granted class certification, the Defendants could withdraw from the settlement. Neither of these stipulations between the settling parties compromised the *Doe I* court's ability to resolve the class certification issues on the merits, after the issue had been fully briefed by the parties with the requisite adversity. In both the first and second class actions, the Court exercised its discretion to approve these settlements and deny class

certification in a manner consistent with the dictates of Rule 23. Plaintiffs' conclusory allegations of "collusion" remain in essence a collateral attack on this Court's previous orders and the recent decision of the Sixth Circuit, which finally put to rest all issues regarding class notice and class certification in the *Guy* Litigation. Nothing that occurred in these two lawsuits provides any factual or legal basis for tolling.[9]

F. LEGAL DISABILITY OF INFANTS

Kentucky has a saving statute that provides:

> If a person entitled to bring any action mentioned in [KY. REV. STAT. §] 413.090 to 413.160, except for a penalty or forfeiture, was, at the time the cause of action accrued, an infant or of unsound mind, the action may be brought within the same number of years after the removal of the disability or death of the person, whichever happens first, allowed to a person without the disability to bring the action after the right accrued.

KY. REV. STAT. § 413.170(1). Thus, the statute of limitations for claims governed by KY. REV. STAT. § 413.140, is tolled

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[9] Plaintiffs also suggest that they are entitled to equitable tolling based upon the filing of the previous class actions purporting to protect the interests of all similarly-situated individuals. The Court is puzzled by Plaintiffs reliance on *United States v. M. J. Kelley Corp. United States v. M. J. Kelley Corp.*, 998 F.2d 656 (6th Cir. 1993). *M. J. Kelley Corp.* provides no support for equitable tolling based on the mere fact that a class action has previously been filed. Rather, the *M. J. Kelley* court equitably tolled the statute of limitations where a plaintiff had timely filed a claim in the wrong court of venue, and subsequently re-filed in the proper venue after the limitations period had expired, indicating that "[t]his case strikes us as one particularly deserving of application of equitable tolling" because the venue and jurisdictional requirements governing this cause of action are "ill-defined and unsettled." *Id.* at 660. Plaintiffs in the instant matter did not timely file their complaint in the wrong court, and the Court is at a loss to see how their failure to timely file could be attributed to lack of clarity in the law.

until a party reaches the age of eighteen (18) years. KY. REV. STAT. § 2.015 (establishing age of majority); KY. REV. STAT. § 413.170(1); *see Hazel v. General Motors Corp.*, 863 F.Supp. 435, 438 (W.D. Ky. 1994).

Further, 18 U.S.C. § 2255 provides for the minority of those alleging injury as follows:

> Any action commenced under this section shall be barred unless the complaint is filed within six years after the right of action first accrues or in the case of a person under a legal disability, not later than three years after the disability.

18 U.S.C. § 2255(b). Accordingly, the Court shall consider the legal disability, notably the youth, of any plaintiff in this matter and compute the statute of limitations for each cause of action as appropriate.

G. CONSIDERING CLAIM ACCRUAL, DISCOVERY RULE, AND INJURY OCCURRENCE RULE IN CONJUNCTION WITH APPLICABLE STATUTES OF LIMITATIONS AND TOLLING THEREOF, ALL FEDERAL CLAIMS SHALL BE DISMISSED

Claims accrual is determined by federal law, and, ordinarily, the Court will apply the "discovery rule" to establish the date on which the statute of limitations began to run, "*i.e.*, the date when the plaintiff knew or through the exercise of reasonable diligence should have known of the injury that forms the basis of his action." *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2003) (*citing Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984)); *Wilson*, 471 U.S. at 268-71; *Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 856 (6th Cir. 2003); *Sidney Coal Co., Inc. v. Massanari*, 221 F. Supp. 2d 755, 769 (E.D. Ky. 2002). However, it is important to note that:

> . . . the discovery rule is only appropriate when a statute is silent on the issue. Otherwise, a federal court must follow a statute if it establishes a time of accrual.

Sidney Coal Co., Inc., 221 F.Supp.2d at 769-770 (internal citations omitted). Accordingly, the Court shall inquire into each cause of action set forth by Plaintiffs.

(1) DISCOVERY RULE IS APPLICABLE TO CLAIMS ALLEGED UNDER 18 U.S.C. § 2255, 20 U.S.C. § 1687(2)(A), AND 42 U.S.C. §§ 1981, 1983, 1985, AND 1986

Plaintiffs contend that they had no actual awareness of a direct connection between the LFUCG and its alleged role in those injuries inflicted upon them by Ron Berry during their participation in Micro-City government. As a result, Plaintiffs aver that the filing of the *Guy* suit on October 15, 1998 serves as the first public indication of the LFUCG's responsibility for the injuries which Plaintiffs sustained and of actual awareness of any connection between LFUCG and that abuse. However, the Court finds that such an argument misconstrues the notion of accrual. General public awareness does not necessarily pinpoint that time when Plaintiffs became aware of their injuries. Rather, each Plaintiff was in a superior position to the general public with regard to discovering his or her own injuries from the time those injuries were allegedly inflicted.

"In applying a discovery accrual rule . . . discovery of the injury, not discovery of the other elements of the claim, is what starts the clock."[10] *Rotella v. Wood*, 528 U.S. 549, 555

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[10] In fact, according to the United States Supreme Court, the discovery rule should not be misconstrued to include a plaintiff's ignorance of his legal rights for the justices were:

> . . . unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has in-

(2000). Otherwise stated, "[a] plaintiff's action accrues when he discovers that he has been injured, not when he determines that the injury was unlawful." *Amini v. Oberlin College*, 259 F.3d 493, 500 (6th Cir. 2001). So it is that the Court must focus on the harm incurred, "rather than the plaintiff's knowledge of the underlying facts which gave rise to the harm."[11] *Friedman v. Estate of Presser*, 929 F.2d 1151, 1159 (6th Cir. 1991); *see Ruff v. Runyon*, 258 F.3d 498, 500-501 (6th Cir. 2001). The test for when a plaintiff knew or should have known of his injury is "an objective one, and the Court determines 'what event should have alerted the typical lay person to protect his or her rights.'" *Sharpe*, 319 F.3d at 266 (*quoting Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991)). Thus, this Court must ascertain upon which date Plaintiffs knew or through the exercise of reasonable diligence should have known of the injury that forms the basis of their claims under 18 U.S.C. § 2255, 20 U.S.C. § 1687(2)(A) and 42 U.S.C. §§ 1981, 1983, 1985, and 1986.

In Counts One and Two, Plaintiffs pray for relief under 42 U.S.C. 1983 by and through injunction and monetary damages. In Count Seven, Plaintiffs complain of a conspiracy on the part of Defendants to violate their civil rights in violation of 42 U.S.C. § 241, 42 U.S.C. §§ 1981 and 1981a and seek

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> flicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask.

United States v. Kubrick, 444 U.S. 111, 122 (1979).

[11] Ultimately, "[t]he limitation period may be triggered before a plaintiff has conclusive knowledge of an injury and its cause or of all the evidence ultimately relied on to support his or her legal theory." *P.R. v. Zavaras*, 49 Fed. Appx. 836, 839-40, 2002 U.S. App. LEXIS 22687 (10th Cir. 2002). For this reason, the Court rejects Plaintiffs' efforts to suggest that they would have had to have known the identity of the defendant before their claims accrued. As is demonstrated through the cases cited herein, the iron-clad certainty suggested by the plaintiffs is hardly requisite to begin the running of a statute of limitations period.

damages under 42 U.S.C. §§ 1983 and 1985 for alleged violations of the Thirteenth and Fourteenth Amendments to the U.S. Constitution and the Second and Eleventh Clauses of the Kentucky Constitution as a result of injuries allegedly sustained during their participation in the Micro-City Government program. [Compl. ¶179(a).] In Count Nine, Plaintiffs complain that Defendants failed to prevent or aid in preventing the wrongs allegedly committed against then-minor Plaintiffs during their participation in the Micro-City Government program or neglected or refused to prevent or aid in preventing those acts which they could have, "by reasonable diligence" have prevented in violation of 42 U.S.C. § 1986. Finally, with regard to Plaintiffs' claims in Count Eleven under the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687(2)(A), Plaintiffs state that Defendants engaged "in intentional, wanton, reckless, and indifferent sexual harassment (discrimination on the basis of sex) of a protected class of citizens, the African-American Plaintiffs, and each of them," thus violating 20 U.S.C. § 1681-88. [Complaint at ¶193.]

Applying the discovery rule, the Court finds that Plaintiffs were aware of the underlying injury of which Plaintiffs complain, the abuse at the hands of Berry, at the same time that they were no doubt aware or could have been aware of the connection between the Micro-City Government and the LFUCG, which is to say that their cause of action had accrued at the time of the alleged abusive acts. If Defendants played any role in permitting or not preventing the injury of which Plaintiffs complain, it took place at that time. Thus, notwithstanding any application of the discovery rule and tolling the time spent in class action litigation in the *Guy* Litigation, all Plaintiffs' claims under 20 U.S.C. § 1687(2)(A) and 42 U.S.C. §§ 1981, 1983, 1985, and 1986 are time barred by the application of the relevant one year statute of limitations. As these causes of action accrued at the latest sometime in 1997 (the latest instance of abuse as alleged by John Doe #19), the one year statute of limitations expired for claims under 20

U.S.C. § 1687(2)(A) and 42 U.S.C. §§ 1981, 1983, 1985, and 1986, at the latest, on December 31, 1998.

Even considering that some of the plaintiffs were under a legal disability due to their young age, the Court finds that none of the Plaintiffs' claims subject to a one-year statute of limitations are viable at this time. The Court notes that, in addition to alleging the latest instances of abuse, the youngest plaintiff is John Doe #19, born on October 30, 1981. He reached the age of eighteen on October 30, 1999. This is to say that any claims subject to one-year statutes of limitations expired for John Doe #19, if his legal disability is considered, on October 30, 2000. Tolling under *American Pipe* for the pendency of the *Guy* litigation, extends his window of opportunity only through February 28, 2001. As the statute of limitations has run for all Plaintiffs, all claims arising under 20 U.S.C. § 1687(2)(A) and 42 U.S.C. §§ 1981, 1983, 1985, and 1986 shall be dismissed with prejudice.

18 U.S.C. § 2255 provides a private right of action to minor victims who suffer injury as a result of violations of various referenced statutes prohibiting sexual exploitation and other abuse of children, but the statute also bars complaints not filed within six years of the accrual of the right of action. 18 U.S.C. § 2255(b). In Count Ten, Plaintiffs claim that Defendants violated or facilitated Berry's violation of 18 U.S.C. §§ 2241, 2242, 2243, and 2251-59 "by employing, using, persuading, inducing, enticing, or coercing said minors to engage in, or assisted other persons to engage in, or transported one or more of said minors in interstate commerce, within and without the Commonwealth of Kentucky, with the intent that said minor Plaintiffs engage in any sexually explicit conduct for the purpose of producing any visual depiction of same . . ." and through their knowledge that such visual depictions would be disseminated through interstate commerce. [Complaint ¶187.] Thus, the discovery of the injury for these § 2255 claims occurred at the time that Plaintiffs were allegedly

employed, used, persuaded, induced, enticed, or coerced to engage in sexually explicit conduct for the purposes of producing visual depictions of the same while participating in the Micro-City Government program, which is to say that any facilitation on the part of Defendants necessarily occurred at the same time.

Plaintiffs have stipulated that they were not abused "after August 29, 1995 in a manner that would permit suit under 18 U.S.C. § 2255." [Pl. Stip. at ¶4.] Ordinarily, the statute of limitations would expire for any claim accruing on that date on August 29, 2001. Even when tolled for the pendency of the *Guy* litigation, the Court notes that the statute of limitations expired at the latest on January 12, 2003, assuming an August 29, 2001 accrual date for a plaintiff's injury under the statute and that he or she was part of the putative class for the *Guy* Litigation. As this matter was not filed until January 13, 2003, any claims under 18 U.S.C. § 2255 are time barred.

(2) RICO CLAIMS ALLEGED IN COUNT SIX ARE GOVERNED BY A FOUR YEAR STATUTE OF LIMITATIONS AND SUBJECT TO THE INJURY OCCURRENCE ACCRUAL STANDARD

In Count Six, Plaintiffs allege that the actions complained of constitute a pattern of racketeering activity over the course of three decades in violation of 18 U.S.C. §§ 1961(1)(B) and 1962(b), (c), and (d) through Defendants' alleged conspiracy with Berry and with each other using their "individual offices and/or positions of authority" in order to commit a variety of alleged predicate acts that perpetuated the Micro-City Government program and allegedly permitted Berry to remain in contact with Plaintiffs through his role in that program whereby he allegedly committed the acts of abuse at the heart of this case. [Complaint ¶174.] The limitations period for such a RICO claims is four years. *Malley-Duff & Assoc., Inc.*, 483 U.S. 143; *Caproni*, 15 F.3d at 619. To date the Supreme Court has declined to chose between the general discovery

rule and the "injury occurrence" rule for RICO claim accrual.[12] *See Rotella*, 528 U.S. at 554 n.2 (rejecting "injury and pattern" discovery rule, but declining to choose between discovery and "injury occurrence" rules); *Bygrave v. Van Reken*, 2000 U.S. App. LEXIS 29377 *13 n. 5 (6th Cir. 2000).

Defendants argue that the accrual rule most consistent with logic and existing Supreme Court jurisprudence is the "injury occurrence" rule. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 196 (1997) (Scalia, J., concurring). This Court agrees as accrual of claims under the Clayton Act is based on the date of the antitrust injury alleged, and the RICO statute of limitations is drawn from the Clayton Act. *See Malley-Duff & Assoc., Inc.*, 483 U.S. 143. In his concurring opinion in *Klehr*, Justice Scalia wrote of this issue:

> [I]t takes no profound analysis to figure out what the decision must be. "Presumably the accrual standards developed by the lower federal courts in . . . civil antitrust litigation should be equally applicable to civil enforcement RICO actions." 1 C. Corman, Limitation of Actions § 6.5.5.1, pp. 447-48 (1991).

Id. at 198. Common sense would indicate that accrual standards and statutes of limitations go together. The former provides the minimum requirements for the action while the latter sets the outer limits of its temporal growth. As the highest court in the land has seen fit to adopt the statute of limitations from the Clayton Act, this Court sees no reason why the complementary accrual standard should not also be adopted for RICO claims: the "cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business . . . []" or, in this instance,

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[12] While it has been taught in the Sixth Circuit that a RICO action accrues when a plaintiff knew or should have known of a defendant's fraudulent scheme, the Supreme Court has determined that an injury and pattern discovery rule, as such, is inappropriate. *See Rotella v. Wood*, 528 U.S. 549, 554 n.2; *Hofstetter v. Fletcher*, 905 F.2d 897, 904 (6th Cir. 1988).

commits an act that injures a plaintiff. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971).

Again, each of Plaintiffs' alleged RICO injuries culminated as a result of any alleged predicate acts, thus, occurring at the time that they were allegedly abused during their participation in the Micro-City Government program. Accordingly, the Court shall again take up the issue of the youngest plaintiffs and those with the latest dates of injury to determine if any plaintiffs have claims that remain viable and within the statute of limitations.

All of the plaintiffs except John Doe #19, the youngest plaintiff, have alleged abuse occurring in or prior to 1993. This is to say that the statutes of limitations on their causes of action under RICO expired, at the latest, in 1997 and before the complaint in the *Guy* litigation was filed. John Doe #19 alleges abuse in 1997. Ordinarily, the statute of limitations for his claim would expire on or before December 31, 2001. Nonetheless, his RICO claim could survive if he received the benefit of tolling under *American Pipe*. However, it is understood that:

> . . . a defendant is put on notice by the initial class action only as to the claims that were raised in that action. Allowing tolling for new and different claims would be prejudicial to the defendant.

See Burns v. Ersek, 591 F. Supp. 837, 8542 [sic] (D. Minn. 1984). No RICO claims were alleged in either the *Guy* litigation or *Doe I*. Only in *Doe II* was a RICO claim pled. Thus, assuming that John Doe #19 was injured on December 31, 1997, without *American Pipe* tolling, the statute of limitations would have run on December 31, 2001, well before the September 25, 2002, filing of *Doe II* wherein the RICO claim was raised for the first time.[13]

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[13] Thus, even assuming without deciding that the statute of limitations could be tolled during the pendency of *Doe II* and that John Doe #19 was

As the latest the statute of limitations could have expired for any plaintiff was on December 31, 2001, there remain no viable claims for RICO violations under §§ 1961(1)(B) and 1962(b), (c), and (d), and any such claims shall be dismissed with prejudice.

H. COURT DECLINES TO EXERCISE SUPPLEMENTAL JURISDICTION OVER REMAINING STATE CLAIMS IN COUNTS FOUR, FIVE, TWELVE, AND THIRTEEN FOR THOSE PLAINTIFFS WHOSE FEDERAL CLAIMS HAVE BEEN DISMISSED

28 U.S.C. § 1367(c) provides that a district court:

> . . . may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction.

28 U.S.C. § 1367(c). In this matter, the Court has dismissed all claims pled by all Plaintiffs arising under federal law and over which it had original jurisdiction. The Court now declines to continue exercising supplemental jurisdiction under 28 U.S.C. § 1367 over those remaining state claims, and they shall be dismissed without prejudice.

I. CONCLUSION

For all of the reasons stated above, all claims of John Does #1, 5, 15, 21, 23, 27, 31, 32, 34, 35, 37, and 40, and Jane Does #1 and 10, shall be dismissed with prejudice. Those federal claims raised by the remaining plaintiffs shall be dismissed with prejudice. As the Court declines to continue to exercise jurisdiction over the pendant state claims, the remaining state claims shall be dismissed without prejudice.

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a member of the putative class in that failed class action in which the original RICO claim was made, no tolling would have taken place as the statute of limitations would have expired prior to the filing of *Doe II* and the claim could not have been raised in that matter. *See Weston*, 265 F.3d at 368-369.

Accordingly, *IT IS ORDERED:*

(1) that the caption and pleadings in this matter be, and the same hereby are, *AMENDED* to reflect that Plaintiff Jane Doe #14 does not exist and that the plaintiffs to this matter are correctly recited as John Does #1-44 and Jane Does #1-13;

(2) that Plaintiff's motion for summary judgment [Record No. 22] be, and the same hereby is, *GRANTED;*

(3) that all other pending federal claims be, and the same hereby are, *DISMISSED WITH PREJUDICE;*

(4) that all other pending state claims be, and the same hereby are, *DISMISSED WITHOUT PREJUDICE.*

This the 21st day of November, 2003.

[SEAL] Signed By:

Joseph M. Hood /s/ JMH
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

[Filed Oct. 7, 2003]

No. 00-166-KSF

JOHN DOE #1-17, *Individually and on behalf of all other similarly situated individuals*
PLAINTIFFS,

v.

PAM MILLER, individually, *et al.*
DEFENDANTS.

ORDER

This matter is before the Court on the motion of all other similarly situated individuals (the "Movants"), pursuant to Federal Rule of Civil Procedure 60(b), requesting that the Court vacate the portion of its final judgment entered on June 28, 2002, that denied class certification [DE #159], and on the motion of the Movants to intervene [DE #158]. Having been fully briefed, these matters are ripe for review.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On October 15, 1998, Keith Rene Guy, Sr., Barry Lynn Demus, Jr., Christopher Andre Williams, and Octavius Gillis filed suit against the Lexington Fayette Urban County Government ("LFUCG") on behalf of themselves and all other similarly situated individuals, alleging that they had been abused by Ronald Berry while participating in the Lexington, Kentucky Micro-City Government program. This action was

styled *Guy, et al. v. LFUCG*, Civil Action No. 98-431-KSF ("*Guy*"). In January of 2000, the parties jointly moved for an agreed order dismissing the case as settled. One named Plaintiff, Guy, objected to the proposed settlement. On January 12, 2000, Craig T. Johnson and David Jones, acting on behalf of the putative class of all other situated individuals, filed a motion objecting to the proposed settlement and demanding service of notice of dismissal to all putative class members. Johnson and Jones subsequently filed a motion requesting leave to intervene as class representatives for the putative class and for class certification. On February 4, 2000, the Court entered an order approving the settlement as to Demus, Williams and Gillis, and dismissing their claims against the LFUCG. On February 28, 2000, the Court issued an order denying Guy's motion to disapprove his settlement, enforcing the settlement, and dismissing Guy's claims against the LFUCG. In the same order, the Court also denied the motion to intervene filed by Johnson and Jones, but reserved ruling on the class certification issue. On April 4, 2000, the Court determined that the proposed class failed to meet the numerosity requirements and denied class certification. Having denied class certification, the Court further denied the request from Johnson and Jones to provide notice of dismissal to all members of the former putative class.

On May 3, 2000, nine John Does, including Johnson and Jones, filed a second class action complaint, raising essentially the same claims as had been raised in *Guy*. This action was styled *Does, et al. v. Miller, et al.*, Civil Action No. 00-166-KSF ("*Doe I*"). Between May 9, 2001 and June 5, 2001, the parties fully briefed the issue of class certification. Simultaneously, the parties negotiated the terms of a possible settlement. The parties ultimately reached a settlement agreement that included, *inter alia*, the following terms: (1) that the Court would need to reach a decision on class certification; and (2) that the Defendants could withdraw from the settlement if the Court granted class certification. On June 28,

2002, the Court issued an order granting the Defendants' motion to deny class certification and approving the parties' settlement of all claims. Again, the Court determined, having granted the Defendants' motion to deny class certification after the issue had been fully briefed by the parties, that it was unnecessary to provide notice of dismissal to the former putative class members.

On September 25, 2002, thirty-eight (38) of the Movants in the present case filed a third class action suit, raising claims similar to those raised in *Guy* and *Doe I*. This action was styled as *Does, et al. v. LFUCG, et al.*, Civil Action No. 02-439-JMH (*Doe II*). Subsequently, fifty-eight (58) of the Movants in the present case filed a fourth class action suit, raising claims similar to those raised in *Guy*, *Doe I*, and *Doe II*. This action was styled as *Does, et al. v. LFUCG, et al.*, Civil Action No. 03-12-JMH. On April 18, 2003, *Doe II* was largely dismissed as being barred by the applicable statute of limitations. The Movants candidly acknowledge that *Doe III* will undoubtedly result in a similar dismissal on statute of limitations grounds.

On April 23, 2003, the Movants filed motions to vacate, pursuant to Federal Rule of Civil Procedure 60(b), and motions to intervene in both *Guy* and *Doe I*. This opinion and order addresses the motions filed by the Movants in *Doe I*.

II. THE MOVANTS' RULE 60(B) MOTION

Federal Rule of Civil Procedure 60(b) provides, in pertinent part, as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether

> heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

The Movants have brought their motion under Rule 60(b)(2), (3), (4), and (6). The Court will address each of these claims in turn.

A. Rule 60(b)(2) and (3)

The Movants will only be entitled to relief under Rule 60(b)(2) if they are able to show "(1) that [they] exercised due diligence in obtaining the information and (2) [that] 'the evidence is material and controlling and clearly would have produced a different result if presented before the original judgment.'" *Good v. Ohio Edison Company*, 149 F.3d 413, 423 (6th Cir. 1998) (*quoting New Hampshire Ins. Co. v. Martech U.S.A., Inc.*, 993 F.2d 1195, 1200-01 (5th Cir. 1993)). Under Rule 60(b)(3), the Movants "must prove that (1) the party maintained a meritorious claim at trial; and (2) because of the fraud, misrepresentation or misconduct of the adverse party; (3) the party was prevented from fully and fairly presenting its case at trial." *Lonsdorf v. Seefeldt*, 47 F.3d 893, 897 (7th Cir. 1995); *See also, Green v. Foley*, 856 F.2d 660, 665 (4th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989). Subsections (b)(2) and (b)(3) appear to exist independently of one another, but the Movants contend that the same set of factual circumstances warrants relief under both subsections.

The Movants claim that they are entitled to relief under subsections (b)(2) and (b)(3) because of the circumstances surrounding the settlement of the named Plaintiffs' claims against the Defendants and the Court's decisions both grant-

ing the Defendants' motion to deny class certification and denying the motion to provide notice of dismissal to the former putative class members. Specifically, Movants' counsel states the following in the memorandum of law in support of the Rule 60(b) motion:

> Accordingly, Plaintiffs herein simply employed the class device as a type of "*strike suit*," using the specter of potential class-wide liability to create leverage against defendants for a high individual settlement, and then "*sold out*" the putative class for their own benefit. By colluding with Defendant to obtain settlement for the individual named Plaintiffs, and by failing to serve as advocates for the putative class, Plaintiffs herein and their counsel, purposefully avoided providing this Court with the factual circumstances that would have affected this Court's determination as to whether the proposed settlement was fair, adequate and reasonable. These actions employed by the LFUCG and Plaintiffs' counsel constitute fraud, collusion, misrepresentation, and other misconduct amply sufficient to warrant relief from the order under Rule 60(b)(2) and/or (3).

Movants' Rule 60(b) Memorandum at p. 17 (emphasis in original). The Movants find collusion in the Defendants' decision to condition its acceptance of the settlement agreement upon a denial of class certification from the Court, and the Plaintiffs' counsel's decision to acknowledge that the putative class failed to satisfy the numerosity requirement of Federal Rule of Civil Procedure 23. The Movants contend that these actions prevented the Court from protecting the interests of the putative class.

The Movants fail to show how this alleged collusion could constitute either "newly discovered evidence" or "fraud" for purposes of Rule 60(b)(2) or (3). As to the former, the Movants fail to even allege that they possess newly discovered evidence that would have produced a different result if presented

to the Court prior to the Court's decisions to enforce the settlement and deny class certification. Accordingly, the Court will deny the Movants' Rule 60(b)(2) motion. As to the latter, the Movants fail to prove that the actions undertaken by Plaintiffs' counsel and the Defendants rise to the level of fraud. There is nothing improper about the Defendants' decision to condition acceptance of the settlement agreement upon a denial of class certification by the Court. It was arguably improper for the Plaintiffs' counsel to bring the action as a class action with knowledge that the numerosity requirement could not be satisfied, but the Movants fail to show how that conduct constitutes fraud, much less show that the conduct had any impact upon the Court's decision, after full briefing, to deny class certification. The Court determined that it would be inappropriate to grant class certification, and no arguments presented by the Movants in support of their present motion suggest to the Court that it was not fully informed when it reached that decision. Specifically, the Court was aware of all of the acts of "collusion" and "misconduct" raised by the Movants in this motion at the time that the Court decided to enforce the settlement and deny class certification. Accordingly, the Court will deny the Movants Rule 60(6)(3) motion.[1]

B. Rule 60(b)(4)

Under Rule 60(b)(4) the Court may set aside its judgment if "the judgment is void." The United States Court of Appeals for the Sixth Circuit has determined that "[a] judgment is void under 60(b)(4) 'if the court that rendered it lacked jurisdiction

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[1] The Court further finds that Judge Joseph M. Hood's statute of limitations decision in *Doe II*, and the Movants' acknowledgment that a similar result is probable in *Doe III* raise serious questions about whether the Plaintiffs ever maintained a meritorious claim. Having found, however, that the Movants have failed to show the existence of any fraud of misconduct, the Court finds that it is unnecessary to specifically address this issue.

of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.'" *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 108 (6th Cir. 1995) (quoting *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992)). The Movants raise no claims regarding the Court's jurisdiction over the subject matter or the parties, and base their request for relief under Rule 60(b)(4) solely upon a claim that the Court's decision to not provide notice of dismissal to the former putative class members was inconsistent with due process of law. Accordingly, the Movants contend that the Court's judgment of dismissal void.

The Movants contend that the provisions of Federal Rule of Civil Procedure 23(e) entitled the former putative class members to notice of the dismissal and settlement. Rule 23(e) provides as follows: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." The Movants contend that the Court should broadly construe Rule 23(e)'s use of the term "class action" to include both certified classes and classes that were not certified. In support of this contention, the Movants rely upon a line of cases that provide the trial court with the discretion to determine whether notice of dismissal and settlement is warranted prior to a decision on class certification. *See In re Cardizem CD Antitrust Litigation*, 2000 WL 33180833 (E.D. Mich. Sept. 21, 2000); *In re Nazi Era Cases Against German Defendants Litigation*, 198 F.R.D. 429 (D. N.J. 2000); *Anderberg v. Masonite Corp.*, 176 F.R.D. 682 (N.D. 1997).

There is a distinction, however, between actions that have been settled and dismissed prior to a court's decision on certification and actions that have been settled and dismissed after a court has denied class certification. Given the somewhat ambiguous use of "class action" in Rule 23(e), it is at least plausible to advance the argument that the Rule applies

to both certified and putative classes. It is another matter altogether, however, to advance the argument, as the Movants have in the present case, that Rule 23(e) could apply in a case where a court has expressly denied class certification, and thus determined that the action is not a class action. In the present case, the Court expressly denied class certification to the putative class of similarly situated individuals, and further determined that it was not required to provide the former putative class members with any notice of the dismissal and settlement. The Court believes that this was the correct decision. The Movants have failed to cite to a single decision that has required a court to provide notice of dismissal and settlement to former putative class members following a denial of class certification. On the contrary, several cases have expressly found that such notification obligations cease to exist once class certification is denied. *See Marian Bank v. Electronic Payment Services, Inc.*, 1999 WL 151872 (D. Del. Mar. 12, 1999); *Maddux & Starbuck, Ltd v. British Airways*, 97 F.R.D. 395 (S.D. N.Y. 1983), *Weisman v. Darneille*, 78 F.R.D. 671 (S.D. N.Y. 1978).

The Court simply does not believe that the class action notification provisions of Rule 23 apply in cases where courts have expressly denied class certification. Even assuming, *arguendo*, that the "functional approach" proposed by the Movants did apply in the present case,[2] the Movants would still not be entitled to relief pursuant to Rule 60(b)(4) because they have failed to demonstrate the existence of any prejudice from the Court's refusal to provide notice of the dismissal and settlement. Accordingly, the Court will deny the Movants' Rule 60(b)(4) motion.

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[2] Under this "functional approach," which has never been extended to actions in which a court has expressly denied class certification, courts have the discretion to provide notice when it appears that the litigation has received wide-spread publicity or where there is potential for prejudice to the claims of the putative class members. *See In re Cardizem, supra.*

C. Rule 60(b)(6)

Rule 60(b)(6) authorizes a court to grant relief from a final judgment for "any other reason justifying relief from the operation of a judgment." The Sixth Circuit has determined that Rule 60(b)(6) should apply "only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989).

The Movants contend that "[i]t is grossly inequitable that the Plaintiffs' and their counsels' intentional misleading of the Court for their own benefit could be allowed to work such a detriment upon the Movants." Movants' Rule 60(b) Memorandum at p. 26. It appears to the Court that the Movants have simply attempted to reargue their other Rule 60(b) motions under the auspices of Rule 60(b)(6). They have failed to raise any arguments that they have not raised elsewhere in their motion, and have, rather, couched their previous arguments in terms of equity and justice for the purpose of obtaining relief under subsection (b)(6). The Movants have failed to present the sort of "exceptional and extraordinary circumstances" that would entitle them to relief under subsection (b)(6). Accordingly, the Court will deny the Movants' Rule 60(b)(6) motion.

III. THE MOVANTS' MOTION TO INTERVENE

In conjunction with their Rule 60(b) motion, the Movants have also requested leave to intervene. Having determined that the Movants' Rule 60(b) motion is without merit, the Court finds that it would be pointless to allow the Movants to intervene. Accordingly, the Court will deny the Movants' request for leave to intervene.

IV. CONCLUSION

Based on the foregoing, the Court, being otherwise fully and sufficiently advise, HEREBY

ORDERS that:

(1) the Movants' Rule 60(b) motion [DE #159] is DENIED; and

(2) the Movants' request for leave to intervene [DE #158] is DENIED.

This 7th day of October, 2003.

/s/ KARL S. FORESTER
KARL S. FORESTER, CHIEF JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

[Filed Oct. 7, 2003]

No. 98-431-KSF

KEITH RENE GUY, SR., BARRY LYNN DEMUS, JR., CHRISTOPHER ANDRE WILLIAMS, and OCTAVIUS GILLIS, *Individually and on behalf of all other similarly situated individuals,*
PLAINTIFFS,

v.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT,
DEFENDANTS.

ORDER

This matter is before the Court on the following motions: (1) the motion of all the other similarly situated individuals (the "Movants"), pursuant to Federal Rule of Civil Procedure 60(b), requesting that the Court vacate the portion of its order entered on April 4, 2000, that denied class certification [DE #84]; (2) the motion of the Movants to intervene [DE #83]; (3) the motion of the former attorneys for the Plaintiff, Keith Rene Guy, Sr., to require payment of the attorneys' fees [DE #89]; (4) Guy's motion to require his former attorneys to accept the fee that he contends that they orally agreed to accept [DE #95]; (5) Guy's motion for transportation and subpoena of witnesses [DE #98]; and (6) Guy's motion for leave to file supplemental affidavit [DE #99]. These matters are ripe for review.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On October 15, 1998, Keith Rene Guy, Sr., Barry Lynn Demus, Jr., Christopher Andre Williams, and Octavius Gillis filed suit against the Lexington Fayette Urban County Government ("LFUCG") on behalf of themselves and all other similarly situated individuals, alleging that they had been abused by Ronald Berry while participating in the Lexington, Kentucky Micro-City Government program. This action was styled *Guy, et al. v. LFUCG*, Civil Action No. 98-431-KSF ("*Guy*"). In January of 2000, the parties jointly moved for an agreed order dismissing the case as settled. One named Plaintiff, Guy, objected to the proposed settlement. On January 12, 2000, Craig T. Johnson and David Jones, acting on behalf of the putative class of all other similarly situated individuals, filed a motion objecting to the proposed settlement and demanding service of notice of dismissal to all putative class members. Johnson and Jones subsequently filed a motion requesting leave to intervene as class representatives for the putative class and for class certification. On February 4, 2000, the Court entered an order approving the settlement as to Demus, Williams and Gillis, and dismissing their claims against the LFUCG. On February 28, 2000, the Court issued an order denying Guy's motion to disapprove his settlement, enforcing the settlement, and dismissing Guy's claims against the LFUCG. In the same order, the Court also denied the motion to intervene filed by Johnson and Jones, but reserved ruling on the class certification issue. On April 4, 2000, the Court determined that the proposed class failed to meet the numerosity requirements and denied class certification. Having denied class certification, the Court further denied the request from Johnson and Jones to provide notice of dismissal to all members of the former putative class.

On May 3, 2000, nine John Does, including Johnson and

Jones, filed a second class action complaint, raising essentially the same claims as had been raised in *Guy*. This action was styled *Does, et al v. Miller, et al.*, Civil Action No. 00-166-KSF ("*Doe I*"). Between May 9, 2001 and June 5, 2001, the parties fully briefed the issue of class certification. Simultaneously, the parties negotiated the terms of a possible settlement. The parties ultimately reached a settlement agreement that included, *inter alia*, the following terms: (1) that the Court would need to reach a decision on class certification; and (2) that the Defendants could withdraw from the settlement if the Court granted class certification. On June 28, 2002, the Court issued an order granting the Defendants' motion to deny class certification and approving the parties' settlement of all claims. Again, the Court determined, having granted the Defendants' motion to deny class certification after the issue had been fully briefed by the parties, that it was unnecessary to provide notice of dismissal to the former putative class members.

On September 25, 2002, thirty-eight (38) of the Movants in the present case filed a third class action suit, raising claims similar to those raised in *Guy* and *Doe I*. This action was styled as *Does, et al. v. LFUCG, et al*, Civil Action No. 02-439-JMH (*Doe II*). Subsequently, fifty-eight (58) of the Movants in the present case filed a fourth class action suit, raising claims similar to those raised in *Guy, Doe I*, and *Doe II*. This action was styled as *Does, et al. v. LFUCG, et al.*, Civil Action No. 03-12-JMH. On April 18, 2003, *Doe II* was largely dismissed as being barred by the applicable statute of limitations. The Movants candidly acknowledge that *Doe III* will undoubtedly result in a similar dismissal on statute of limitations grounds.

On April 23, 2003, the Movants filed motions to vacate, pursuant to Federal Rule of Civil Procedure 60(b), and motions to intervene in both *Guy* and *Doe I*. This opinion and order addresses the motions filed by the Movants in *Doe I*.

This opinion also addresses the attorneys' fees motions filed by both Guy, and his former attorneys.

II. THE MOVANTS' RULE 60(B) MOTION

Federal Rule of Civil Procedure 60(b) provides, in pertinent part, as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

The Movants have brought their motion under Rule 60(b)(4), and (6). The Court will address each of these claims in turn.

A. Rule 60(b)(4)

Under Rule 60(b)(4) the Court may set aside its judgment if "the judgment is void." The United States Court of Appeals for the Sixth Circuit has determined that "[a] judgment is void under 60(b)(4) 'if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.'" *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 108 (6th Cir. 1995) (quoting *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992)). The Movants raise no claims regarding the Court's jurisdiction

over the subject matter or the parties, and base their request for relief under Rule 60(b)(4) solely upon a claim that the Court's decision to not provide notice of dismissal to the former putative class members was inconsistent with due process of law. Accordingly, the Movants contend that the Court's judgment of dismissal is void.

The Movants contend that the provisions of Federal Rule of Civil Procedure 23(e) entitled the former putative class members to notice of the dismissal and settlement. Rule 23(e) provides as follows: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." The Movants contend that the Court should broadly construe Rule 23(e)'s use of the term "class action" to include both certified classes and classes that were not certified. In support of this contention, the Movants rely upon a line of cases that provide the trial court with the discretion to determine whether notice of dismissal and settlement is warranted prior to a decision on class certification. *See In re Cardizem CD Antitrust Litigation*, 2000 WL 33180833 (E.D. Mich. Sept. 21, 2000); *In re Nazi Era Cases Against German Defendants Litigation*, 198 F.R.D. 429 (D. N.J. 2000); *Anderberg v. Masonite Corp.*, 176 F.R.D. 682 (N.D. 1997).

There is a distinction, however, between actions that have been settled and dismissed prior to a court's decision on certification and actions that have been settled and dismissed after a court has denied class certification. Given the somewhat ambiguous use of "class action" in Rule 23(e), it is at least plausible to advance the argument that the Rule applies to both certified and putative classes. It is another matter altogether, however, to advance the argument, as the Movants have in the present case, that Rule 23(e) could apply in a case where a court has expressly denied class certification, and thus determined that the action is not a class action. In the

present case, the Court expressly denied class certification to the putative class of similarly situated individuals, and further determined that it was not required to provide the former putative class members with any notice of the dismissal and settlement. The Court believes that this was the correct decision. The Movants have failed to cite to a single decision that has required a court to provide notice of dismissal and settlement to former putative class members following a denial of class certification. On the contrary, several cases have expressly found that such notification obligations cease to exist once class certification is denied. *See Marian Bank v. Electronic Payment Services, Inc.*, 1999 WL 151872 (D. Del. Mar. 12, 1999); *Maddux & Starbuck, Ltd. v. British Airways*, 97 F.R.D. 395 (S.D. N.Y. 1983), *Weisman v. Darneille*, 78 F.R.D. 671 (S.D. N.Y. 1978).

The Court simply does not believe that the class action notification provisions of Rule 23 apply in cases where courts have expressly denied class certification. Even assuming, *arguendo*, that the "functional approach" proposed by the Movants did apply in the present case,[1] the Movants would still not be entitled to relief pursuant to Rule 60(b)(4) because they have failed to demonstrate the existence of any prejudice from the Court's refusal to provide notice of the dismissal and settlement. Accordingly, the Court will deny the Movants' Rule 60(b)(4) motion.[2]

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[1] Under this "functional approach," which has never been extended to actions in which a court has expressly denied class certification, courts have the discretion to provide notice when it appears that the litigation has received wide-spread publicity or where there is potential for prejudice to the claims of the putative class members. *See In re Cardizem, supra.*

[2] In support of their Rule 60(b)(4) motion, the Movants have alleged acts of collusion and misconduct on the part of the named Plaintiffs and the Defendant. The Court finds that these allegations have no bearing upon the analysis of the legitimacy of its decisions to enforce the settlement and deny class certification.

B. Rule 60(b)(6)

Rule 60(b)(6) authorizes a court to grant relief from a final judgment for "any other reason justifying relief from the operation of a judgment." The Sixth Circuit has determined that Rule 60(b)(6) should apply "only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989).

The Movants contend that "[i]t is grossly inequitable that the Plaintiffs' and their counsels' intentional misleading of the Court for their own benefit could be allowed to work such a detriment upon the Movants." Movants' Rule 60(b) Memorandom at p. 24. It appears to the Court that the Movants have simply attempted to reargue their other Rule 60(b) motions under the auspices of Rule 60(b)(6). They have failed to raise any arguments that they have not raised elsewhere in their motion, and have, rather, couched their previous arguments in terms of equity and justice for the purpose of obtaining relief under subsection (b)(6). The Movants have failed to present the sort of "exceptional and extraordinary circumstances" that would entitle them to relief under subsection (b)(6). Accordingly, the Court will deny the Movants' Rule 60(b)(6) motion.

III. THE MOVANTS' MOTION TO INTERVENE

In conjunction with their Rule 60(b) motion, the Movants have also requested leave to intervene. Having determined that the Movants' Rule 60(b) motion is without merit, the Court finds that it would be pointless to allow the Movants to intervene. Accordingly, the Court will deny the Movants' request for leave to intervene

IV. THE MOTION OF THE FORMER PLAINTIFF'S ATTORNEYS FOR FEES

Plaintiff Guy's former attorneys, David A. Friedman, Robert E. Reeves and Mark D. Goss (the "former attorneys"), request that the Court enter an order directing the LFUCG to draw a check made payable to them only in the amount of $42,500.00, and to transmit the check directly to Reeves for disbursement. The former attorneys contend that this measure is necessary because they have reason to believe that Guy will not voluntarily agree to endorse a check made payable to him and his attorneys. The LFUCG claims that it forwarded a check, made payable to Guy and his attorneys, to Reeves on June 5, 2003. The LFUCG further asserts that it is not a party to any fee agreement between Guy and his former attorneys, and that it fully complied with its obligations under the settlement with Guy, and should have no further obligation to either Guy or his former attorneys.

The Court finds that the LFUCG has complied with its obligations under the settlement agreement. The Court further finds that this is not the appropriate forum for resolution of any contractual dispute between Guy and his former attorneys. The former attorneys may wish to pursue this matter in state court. Accordingly, the Court will deny the former attorneys' motion.

V. GUY'S MOTION TO REQUIRE HIS FORMER ATTORNEYS TO ACCEPT THE FEE THAT HE CLAIMS THEY ORALLY AGREED TO ACCEPT

Guy contends that his former attorneys orally agreed to accept only twenty-five (25) percent of all sums recovered on behalf of Guy if Guy's claims could be settled without going to trial. Accordingly, Guy contends that his former attorneys are only entitled to a fee of $28,125.00, rather than the $42,500.00 claimed by the former attorneys. For the reasons

set forth above in the Court's discussion of the former attorneys' motion for fees, the Court will deny Guy's motion.

VI. GUY'S MOTION FOR TRANSPORTATION AND SUBPOENA OF WITNESSES

Guy requests that the Court enter an order requiring Guy to be transported from the Western Kentucky Correctional Complex to the Court for all hearings that the Court might hold in the present case. Guy further requests that the Court assist him in subpoenaing witnesses in support of his attorneys' fee claim. Having determined that Guy's attorneys' fee motion should be denied, and knowing of no further hearings that will be necessary in the present case, the Court will deny Guy's motion as moot.

VII. GUY'S MOTION FOR. LEAVE TO FILE SUPPLEMENTAL AFFIDAVIT

Guy requests that the Court grant him leave to file a supplemental affidavit in response to his former attorneys' motion for attorneys' fees. Having determined that the former attorneys' motion should be denied, the Court will deny Guy's motion as MOOT.

IV. CONCLUSION

Based on the foregoing, the Court, being otherwise fully and sufficiently advise, HEREBY ORDERS that:

(1) the Movants' Rule 60(b) motion [DE #84] is DENIED;

(2) the Movants' request for leave to intervene [DE #83] is DENIED;

(3) the former attorneys' request for attorneys' fees [DE #89] is DENIED;

(4) Guy's motion to require his former attorneys to accept the fee that he claims that they agreed to accept [DE #95] is DENIED;

(5) Guy's motion for transportation and for subpoena of witnesses [DE #98] is DENIED AS MOOT; and

(6) Guy's motion for leave to file supplemental affidavit [DE #99] is DENIED AS MOOT.

This 7th day of October, 2003.

/s/ Karl S. Forester
KARL S. FORESTER, CHIEF JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

[Filed Apr. 15, 2003]

CIVIL ACTION NO. 02-439-JMH

JOHN DOE #1-33, Jane Doe # 1-5, *et al.*,
PLAINTIFFS,

v.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, *et al.*,
DEFENDANTS.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendants' motion for summary judgment [Record No. 56]. Plaintiffs have responded [Record No. 71], and Defendants have replied [Record No. 74]. This matter is now ripe for decision.

FACTUAL BACKGROUND

Plaintiffs are former participants in programs sponsored, funded, conducted, or approved by the Lexington-Fayette Urban County Government ("LFUCG") through an organization called Micro-City Government, Inc. ("Micro-City Government"), founded by Ronald Berry in 1969 as an enrichment program for Lexington's inner-city youth. Micro-City Government was substantially funded by the Lexington-Fayette Urban County Government ("LFUCG") and often served to implement programs for or on behalf of LFUCG. During their participation in the program, Plaintiffs allege that they were sexually molested and encouraged to use alcohol and drugs by Ronald Berry and others.

Seeking remedy for injuries allegedly inflicted during and as a result of participation in the Micro-City Government program, *Guy v. LFUCG* (hereinafter, "*Guy* Litigation") was filed as a class action in the Eastern District of Kentucky on October 15, 1998. *Guy v. LFUCG*, Civil Action No. 98-431 (E.D.Ky., Lexington Division). On February 28, 2000 that case was settled on behalf of all named plaintiffs and the matter dismissed, effectively terminating the class action. Subsequently, on April 4, 2000, the Court declined to permit theretofore unnamed putative class members to intervene in the matter and object to the settlement or to require notice to formerly putative class members regarding the settlement. On May 3, 2000, a second class action ("*Doe I*") was filed in the same Court, again seeking relief for injuries allegedly inflicted during and as a result of participation in the Micro-City Government program. *Doe v. LFUCG*, Civil Action No. 00-166 (E.D.Ky., Lexington Division). Class certification was denied and the matter was settled on behalf of the named Plaintiffs by the Court's order of June 28, 2002. On September 25, 2002, the instant case was filed, once again seeking relief for injuries allegedly inflicted during and as a result of participation in the Micro-City Government program. The latest date of alleged abuse that has been indicated in this matter was stated by John Doe #21, alleging that he was abused while participating in the program sometime in May 1995.

In their motion for summary judgment, Defendants aver that the passage of time has stripped the causes of action set out in Plaintiffs' Complaint of their viability and request that this Court dismiss Plaintiffs' federal causes of action as the constituent claims are now time-barred. As set forth below, the Court agrees, in large part, that Plaintiffs' federal causes of action—save one claim by one Plaintiff—are barred by the applicable statutes of limitations and should be dismissed.

APPLICABLE STANDARD OF REVIEW

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." The moving party may discharge its burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The nonmoving party, which in this case is the plaintiff, "cannot rest on [her] pleadings," and must show the Court that "there is a genuine issue for trial." *Hall v. Tollett*, 128 F.3d 418, 422 (6th Cir. 1997). In considering a motion for summary judgment the court must construe the facts in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

DISCUSSION

A. 42 U.S.C. §13981 IS UNCONSTITUTIONAL PER THE UNITED STATE SUPREME COURT'S DECISION IN *UNITED STATES V. MORRISON*; CLAIM ALLEGED IN COUNT THREE SHALL BE DISMISSED

As an initial matter, the Court notes that Plaintiffs attempt to state a claim under 42 U.S.C. §13981 in Count Three. The United States Supreme Court determined §13981 to be unconstitutional in the case of *United States v. Morrison*, 529 U.S. 598 (2000) (Congress had no power under either the Commerce Clause or §5 of the Fourteenth Amendment to enact §13981). Accordingly, this Court shall not consider the claims alleged thereunder, and they shall be dismissed.

B. STATUTES OF LIMITATIONS

Statutes of limitation represent "a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right

to be free of stale claims in time comes to prevail over the right to prosecute them." *United States v. Kubrick*, 444 U.S. 111, 117 (1979). As the parties have briefed the issue of the statutes of limitations for the federal causes of action raised by Plaintiffs, the Court shall consider each cause of action alleged in turn in order to determine what statute of limitations applies to each federal cause of action alleged by Plaintiffs.

(1) Claims Alleged in Counts One, Two, Seven, Eight, Nine, and Eleven of Plaintiffs' Complaint Pursuant to 20 U.S.C. §1687(2)(A) and 42 U.S.C. §§1981, 1983, 1985, and 1986 Are Subject to a One Year Statute of Limitations

42 U.S.C. §§1981, 1983,[1] 1985, and 20 U.S.C. §1687(2)(A)[2], under which Plaintiffs complain in Counts

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[1] The Court notes that Plaintiffs' Complaint actually suggests that relief would be proper under "28 U.S.C. §1983." Noting that 28 U.S.C. §1983 would be part of that body of law addressing the judiciary and judicial procedure and, more specifically, pending actions and judgments, the Court shall proceed as the parties have in their subsequent proceedings to presume that Plaintiffs intended to state that such relief would be proper under 42 U.S.C. §1983.

[2] This portion of Title IX defines "program or activity" and "program" to mean all the operations of "a college, university or other postsecondary institution, or a public system of higher education." 20 U.S.C. §1687(2)(A). Given the facts of this case and the nature of the Micro-City Government program in which the Plaintiffs participated, the Court is somewhat puzzled by Plaintiffs' statement that their claims Title IX claims under 20 U.S.C. §§1681-1688 are somehow pursuant to §1687(2)(A). In any event, the Court notes that there is an implied private right of action under Title IX in certain circumstances. *See, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999) (private damages action could lie against school board in case of student-on-student harassment where funding recipient acted with deliberate indifference to known acts of harassment in its programs or activities). Notwithstanding whether or not Plaintiffs have properly stated a claim such that an implied private right of action exists in the present matter, the Court finds for the reasons

One, Two, Seven, Eight, Nine, and Eleven, do not provide their own statutes of limitations. Where a federal statute fails to include a statute of limitations, federal courts must adopt the most analogous state statute in determining the appropriate statute of limitations. For actions under 42 U.S.C. §§1981, 1983, §1985 and 20 U.S.C. §1687(2)(A), that statute of limitations is found in the "general or residual statute for personal injury actions."[3] *Goodman v. Lukens Steel Co.*; 482 U.S. 656 (1987) (§1981); *Wilson v. Garcia*, 471 U.S. 261 (1985) (§1983 claims); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 729 (6th Cir. 1996) (Title IX); *Boatright v. American Academy of Actuaries*, 2000 WL 303020, *2 (6th

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stated in this opinion that, even if such a claim could be stated, it would be barred by the running of the applicable statute of limitations and will inquire no further into this matter.

[3] In Count Eight, Plaintiffs complain of a hostile work environment in violation of 42 U.S.C. §2000(e), *et seq.*, due to the "abuses and enslavements" endured "in order to receive wages or paychecks from the Defendant employers of African-American children." [Complaint ¶182.] While Plaintiff prays for relief under 42 U.S.C. §2000e-5(e) pursuant to 42 U.S.C. §§1986 and 1988, the Court notes that the enforcement provisions in 42 U.S.C. §2000e-5(e) provide that:

> A charge under this section shall be filed [with the Equal Employment Opportunity Commission (EEOC)] within one hundred and eighty days after the alleged unlawful employment practice occurred . . .

42 U.S.C. §2000e-5(e)(1). A plaintiff may institute their own civil action within 90 days of receiving his or her right to sue letter from the EEOC. 42 U.S.C. §2000e-5(f)(1)(A). It does not appear that Plaintiffs in the instant matter have ever filed a complaint with the EEOC, let alone within 180 days of the employment actions giving rise to their individual claims of discrimination and hostile work environment, nor was a right to sue letter ever issued. Accordingly, Plaintiffs' claims for denial of equal employment opportunities as alleged in Count Eight are barred, in the first instance, by their failure to pursue remedies in the manner prescribed by the statute. *See EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836, 839 (6th Cir. 1994) (*citing Allen v. United States Steel Corp.*, 665 F.2d 689, 695 (5th Cir. 1982)).

Cir. 2000) (§1985); *McWhorter v. Miller*, 221 F.3d 1335, 2000 WL 924597,*2 (6th Cir. 2000) (§1985). The Sixth Circuit Court of Appeals has followed the United States Supreme Court's determination in *Wilson* that where a state maintains multiple personal injury statutes of limitations for personal injury matters that the most analogous general personal injury statute of limitation still controls. *Deaton v. City of Dayton*, 14 F.3d 600 (6th Cir. 1993).

The appropriate general personal injury statute of limitations in Kentucky measures one year.[4] KY. REV. STAT. §413.140(1); *Bedford v. University of Louisville School of Medicine*, 887 F.2d 1086 (6th Cir. 1989). Accordingly, a one year statute of limitations applies to the causes of action alleged under 42 U.S.C. §§1981, 1983, 1985 and 20 U.S.C. §1687(2)(A).

42 U.S.C. §1986 provides that:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured . . .
>
> . . . But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

42 U.S.C. §1986. Thus, by statute, Plaintiffs' claims under §1986 are subject to a one-year statute of limitations.

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[4] KY. REV. STAT. §413.140 provides that:

> (1) The following actions shall be commenced within one (1) year after the cause of action accrued:
>
> (a) An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice, or servant . . .

KY. REV. STAT. §413.140(1)(a).

(2) RICO CLAIMS ALLEGED IN COUNT SIX ARE GOVERNED BY A FOUR YEAR STATUTE OF LIMITATIONS

In Count Six, Plaintiffs allege that the actions complained of constitute a pattern of racketeering activity over the course of three decades in violation of 18 U.S.C. §§1961(1)(B) and 1962(b), (c), and (d) through Defendants' alleged conspiracy with Berry and with each other using their "individual offices and/or positions of authority" in order to commit a variety of alleged predicate acts. [Complaint ¶174.] The limitations period for such a RICO claims is four years. *Agency Holding Corp. v. Malley- Duff & Assoc., Inc.*, 483 U.S. 143 (1987); *Caproni v. Prudential Securities, Inc.*, 15 F.3d 614, 619 (6th Cir. 1994).

(3) 18 U.S.C. §2255 PROVIDES SIX YEAR STATUTE OF LIMITATIONS FOR CLAIMS ALLEGED IN COUNT TEN FOR VIOLATION OF 18 U.S.C. §§2241, 2242, 2245, 2251, 2251 [sic], 2252, AND 2258

18 U.S.C. §2255 provides for the civil remedy of personal injuries under §§2241, 2242, 2245, 2251, 2251 [sic], 2252, and 2258 with the following limitation:

> Any action commenced under this section shall be barred unless the complaint is filed within six years after the right of action first accrues or in the case of a person under a legal disability, not later than three years after the disability.

18 U.S.C. §2255(b).

C. *AMERICAN PIPE* PROVIDES FOR TOLLING OF APPLICABLE STATUTE OF LIMITATIONS FOR ALL MEMBERS OF PUTATIVE CLASS IN *GUY* LITIGATION UNTIL CLASS CERTIFICATION WAS DENIED OR CASE WAS DISMISSED

In *American Pipe & Const. Co. v. Utah*, the Supreme Court held that:

> [T]he rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.

American Pipe & Const. Co., 414 U.S. 538, 554 (1974). Once tolled, the statute of limitations remains tolled for all putative class members until class certification is denied or the case is dismissed. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983).

It has also been noted "[t]he tolling rule of *American Pipe* is a generous one, inviting abuse[,]" and it "should not be read . . . as leaving a plaintiff free to raise different or peripheral claims following denial of class status." *Crown, Cork & Seal Co.*, 462 U.S. at 354 (Powell, J., concurring). Thus, it is taught in the Sixth Circuit that "[u]nder *American Pipe*, the statute of limitations for putative class members of the original class is tolled only for substantive claims that were raised, or could have been raised, in the initial complaint." *Weston v. AmeriBank*, 265 F.3d 366, 368-369 (6th Cir. 2001).[5]

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[5] In *Weston*, a plaintiff's claim was barred by federal statute's one-year statute of limitations where the initial complaint in a prior class action had alleged solely state law violations and the state circuit court denied the plaintiff's request to amend that complaint to assert the federal claim alleged in subsequent suit because the applicable statute of limitations had run when initial complaint in prior class action was filed. *Weston v.*

Further, *American Pipe* tolling "was not intended to be applied to suspend the running of statutes of limitations for class action suits filed after a definitive determination of class certification; such an application of the rule would be inimical to the purposes behind statutes of limitations and the class action procedure." *Korwek v. Hunt*, 827 F.2d 874, 879 (2nd Cir. 1987). Thus, a class action can toll the statute of limitations only once, and class members cannot "piggyback" tolling periods by filing successive class actions, motions for reconsideration of prior class rulings, or motions to expand the class. *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988); *see Korwek*, 827 F.2d at 879; *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985) ("Plaintiffs have no authority for their contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely. . . ."); *Piney Woods County Life School v. Shell Oil Company*, 170 F.Supp.2d 675, 687 (S.D. Miss. 1999).

Thus, with the filing of the *Guy* Litigation as a class action on October 15, 1998 in the Eastern District of Kentucky on behalf of all similarly-situated parties against the LFUCG and many of the same Defendants named in the present action, and seeking damages for injuries resulting from the alleged promotion, financing, and condoning of Berry's actions over his thirty-year tenure as the leader of Micro-City, any unexpired statutes of limitations on Plaintiffs' claims were tolled. On February 28, 2000, the Court approved a settlement as it

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AmeriBank, 265 F.3d 366, 368-369 (6th Cir. 2001). As the state law claims raised in the earlier class action were thus separate and distinct from federal claim, the earlier class action did not toll the federal statute's one-year statute of limitations because earlier plaintiffs could not have included the claim in their initial complaint because their complaint was filed after the one-year statute of limitations had run. *Id.* Similarly, in this matter, the statutes of limitations for several of Plaintiffs' claims had expired prior to the commencement of the *Guy* litigation and those statutes of limitations will not be tolled during the pendency thereof.

related to the remaining class representative and entered an order of dismissal. As the case was dismissed and the class not certified, the tolling of the unexpired statutes of limitations on Plaintiffs' claims ended.[6] *See Crown, Cork & Seal Co.*, 462 U.S. at 353-54.

On May 3, 2000, a second class action law suit, *Doe I*, was filed, alleging much of the same conduct on the part of Defendants. On June 28, 2002, the District Court entered an order approving a settlement for the named parties and denying class certification. Plaintiffs argue that any unexpired statutes of limitations were also tolled during the pendency of *Doe I*. However, the law does not provide for a second tolling period. As described above, Plaintiffs may not piggyback successive class actions to toll the unexpired statutes of limitations applicable to their claims. *Andrews*, 851 F.2d at 149; *see Korwek*, 827 F.2d at 879; *Salazar-Calderon*, 765 F.2d at 1351.

Accordingly, the Court finds that tolling of any unexpired statutes of limitations took place during the pendency of the *Guy* Litigation, from October 15, 1998 to February 28, 2000.

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[6] Plaintiffs suggest the 1998 addition of Rule 23(f), allowing permissive interlocutory appeal of class certification determinations would properly require the continued tolling of a statute of limitations during the pendency of an appeal. [Response at 28 (*citing Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374 (11th Cir. 1998).] In *Armstrong*, cited by Plaintiffs, the Eleventh Circuit specifically held that tolling ends upon the denial of class certification by the trial court while stating that if then-pending Rule 23(f) were adopted, the court *might* consider allowing tolling to continue during the pendency of *interlocutory* appeals pursuant to Rule 23(f). *Armstrong*, 138 F.3d at 1389 n. 35. The *Armstrong* court indicated no intention to consider further tolling outside the narrow exception for interlocutory appeals. In fact, it appears that no Circuit has adopted such an approach, and this Court does not see the wisdom of using the instant matter to craft such an approach, considering that no interlocutory appeals would have been possible in the earlier failed class actions as denial of class certification was not realized until such time as final judgment was entered.

In total, any unexpired statute of limitations was tolled for 501 days, approximately one year and five months, by the pendency of that litigation.

D. OTHER TOLLING DOCTRINES

Generally, federal courts borrow a state's tolling rules unless applying the tolling rules would defeat the goals of the federal statute at issue. *Board of Regents v. Tomanio*, 446 U.S. 478, 484-486 (1980); *Hardin v. Straub*, 490 U.S. 536, 539 (1989). The Plaintiffs rely on the doctrines of equitable estoppel (also known as fraudulent concealment) and equitable tolling in their response to Defendants' motion for summary judgment. Accordingly, the Court shall consider each in turn.

(1) EQUITABLE ESTOPPEL

Kentucky has codified the doctrine of equitable estoppel or fraudulent concealment through the enactment of KY. REV. STAT. 413.190(2). *See Munday v. Mayfair Diagnostic Lab.*, Ky., 831 S.W.2d 912, 914-15 (1992) (the statute "is simply a recognition in law of an equitable estoppel . . . to prevent fraudulent or inequitable application of a statute of limitations"). The statute provides that:

> [T]he time of the continuance of the [defendant's] . . . obstruction [of the prosecution of the action] shall not be computed as any part of the period within which the action shall be commenced.

KY. REV. STAT. 413.190(2). Once the "obstruction" is removed, a plaintiff has a duty to exercise reasonable diligence in pursuing his or her claims. *See Cuppy v. Gen. Accident Fire & Life Assurance Corp.*, 378 S.W.2d 629, 630-31 (Ky. 1964). In order to establish fraudulent concealment:

> Defendant's action must have prevented Plaintiff from inquiring into the action, or eluded Plaintiff's investigation, or otherwise mislead the Plaintiff.

Hazel v. General Motors Corp., 863 F.Supp. 435, 439 (W.D.Ky., 1994) (*citing Burke v. Blair*, 349 S.W.2d 836, 837 (Ky. 1961)). However, the plaintiff is always "under the duty to exercise reasonable care and diligence to discover whether he has a viable legal claim," and any fact that should arouse his suspicion is equivalent to "actual knowledge of his entire claim." *Id.* (*quoting Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975)).

Plaintiffs argue that the fact that various individuals associated with the LFUCG were unaware of any involvement on the part of LFUCG with the alleged abuse of Micro-City Government participants by Berry somehow indicates that they could not have been aware of the same. The Court remarks that Plaintiffs argument is strikingly similar to that made with regard to accrual of the claims and discussed below. To the extent that the Court believes that Plaintiffs have not entirely confused the notions of claim accrual and equitable estoppel, the Court shall consider this argument.

Plaintiffs concede that the general nature of the allegations against the Defendants was public knowledge by no later than October 15, 1998, with the filing of the *Guy* Litigation. This is to say that doubtlessly the Plaintiffs were on notice of the wrongs alleged from that time forward. However, the Court is not entirely convinced that such an obstruction existed prior to the filing of the *Guy* Litigation. As discussed below, in the analysis of claim accrual, it would not have been necessary for the Plaintiffs to possess every single detail about their claims that the Defendants could possibly have been withholding in order for their claims to have accrued and been discovered. *See Hazel v. Gen. Motors Corp.*, 863 F. Supp. 435, 439 (W.D. Ky. 1994), *aff'd in pertinent part* 83 F.3d 422 (6th Cir. 1996) (holding that concealment of evidence of defect in gas tank design by defendant did not justify tolling for fraudulent concealment, because not enough information had

been concealed to prevent plaintiff from assessing whether he should file complaint).

Therefore Plaintiffs' reliance on *Roman Catholic Diocese of Covington v. Secter*, Ky. App., 966 S.W.2d 286 (1998) is misplaced. Applying KY. REV. STAT. 413.190, the court stated:

> Obstruction might also occur where a defendant conceals a plaintiff's cause of action so that it could not be discovered by the exercise of ordinary diligence on the plaintiff's part.

Id. at 290 (*quoting Rigazio v. Archdiocese of Louisville*, Ky. App., 853 S.W.2d 295, 297 (1993)). Similarly, *Jarrett v. Kassel*, 972 F.2d 1415 (6th Cir. 1992) merely held that the due diligence of a class representative (or the attorney for the class) in discovering any additional related claims of the class could be attributed to the entire class for tolling purposes. Both of these cases involved a plaintiff (or his representative) who had demonstrated the required due diligence necessary to justify application of tolling for fraudulent concealment.

All things considered, the Court is convinced that the Plaintiffs were sufficiently aware of facts that should have aroused their suspicion of the claims against Defendants at the time of their injuries. Specifically, the LFUCG's sponsorship of and involvement with the Micro-City Government program were not hidden facts. Insofar as Plaintiffs were injured during their participation in that program and no doubt aware of the injuries at that time, the onus was placed on them to "exercise reasonable care and diligence to discover whether [there was] a viable legal claim" arising from those injuries could be sustained and against whom. There is no indication that Plaintiffs exercised any diligence, ordinary or otherwise, in order to uncover the source of their injury during the unexpired statutes of limitations for their claims. Statements concerning the failure of other parties to discover

the same will not substitute for their own duty to safeguard and secure their own legal claims. Equitable estoppel is not merited on these grounds.

This Court is also of the opinion that Plaintiffs are not entitled to equitable estoppel based on alleged misrepresentations by Hon. Michael Baker, during his representation of the Defendants in the *Guy* Litigation. The Plaintiffs refer to a brief filed therein by Defendants in opposition to the intervenors' motion to intervene as class representatives. Defendants allege that Hon. Baker represented that "no individual claims would be harmed" and made express assurances" [sic] that an order denying class certification "would have no effect on any claims" brought by the intervenors. [Pl. Mem. Opp., at 29-30.]

Baker's statements did not create an "obstruction" of the prosecution of the action as required for the application of collateral estoppel by KY. REV. STAT. 413.190(2). Plaintiffs' assertions that the Court relied on these alleged representations in denying the intervention or that the Plaintiffs relied in bringing their claims outside the limitations period are unreasonable at best and in bad faith at worst.[7] *See Adams v. Ison*, 249 S.W.2d 791, 793 (Ky. 1952) ("the representation or conduct must have been relied upon reasonably and in good faith and have resulted in prejudice from having refrained from commencing his action within the limitation period.").

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[7] Defendants have rather keenly stated how the requirement of reliance reveals a fundamental inconsistency between the Plaintiffs' tolling arguments:

> One the one hand, Plaintiffs argue that the limitations period should be tolled because they did not receive notice of the settlement and denial of class certification. On the other hand, the Plaintiffs claim to have relied on assurances that denial of class certification would have no effect on the running of the statutes of limitation. If the Plaintiffs were not even aware of these events, they could not have relied on the prior representations of defense counsel.

[Reply at 15.]

As a practical matter, the dismissal and settlement of *Guy* had "no preclusive effect" on the substantive claims of individuals because a class had not been certified. Further, the Court notes that "the proposed intervenors [were] free to plead class action allegations" in a subsequent lawsuit and did so in *Doe I*. The same parties and other potential plaintiffs could have also filed individual suits against Defendants within the window created by the accrual of their claims and the running of the statute of limitations, including any applicable tolling for the pendency of the failed *Guy* Litigation class action. Defense counsel did not represent that any individual or class claims subsequently brought by the intervenors would necessarily be valid or immune from attack on the basis of a defense based on the statute of limitations.

This is to say that the imperative to timely file a new complaint in this matter was clearly on Plaintiffs and their counsel, notwithstanding their current protestations, under their continuing "duty to exercise reasonable care and diligence." *Hazel*, 863 F.Supp. at 439. Defendants, through their counsel, cannot be charged with Plaintiffs' or Plaintiffs' counsel's failure to properly understand the law and calculate the statute of limitations.

(2) EQUITABLE TOLLING

Limitations periods are "customarily subject to 'equitable tolling,'" unless tolling would be "inconsistent with the text of the relevant statute," *Young v. U.S.*, 122 S.Ct. 1036, 1040 (2002) (*quoting Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990); *United States v. Beggerly*, 524 U.S. 38, 48 (1998)). However:

> Equitable tolling is available in suits only where notice is insufficient or "where the claimant has actively pursued his judicial remedies by filing a defective pleading [during the statutory period] or where he has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."

Shisler v. U.S., 199 F.3d 848, 852 (6th Cir. 1999) (*citing Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 90 (1990)).

Plaintiffs' argument for equitable tolling centers on the circumstances of the settlement and denial of class certification in the *Guy* Litigation. In approving the settlement of the named plaintiffs' claims on February 4 and 28, 2000, the *Guy* court determined not to certify the class and denied a motion to intervene by two intervening plaintiffs seeking class certification and made it clear that the unsuccessful intervenors were free to pursue their individual claims. On April 4, 2000, the *Guy* court denied the intervenors' request that notice be sent to all absent class members to provide them an opportunity to object to the settlement as the *Guy* court had already denied the class certification prior to the settlement. *See Muntz v. Ohio Screw Products*, 61 F.R.D. 396 (N.D. Ohio 1973).

Plaintiffs argue that any tardy filing should be excused because of those actions taken by Defendants during the *Guy* litigation. Specifically, Plaintiffs allege intentional efforts to dismiss the class actions without proper notice, coupled with the alleged lack of proper notice to the Plaintiffs of their individual claims against the Defendants, resulting in a lack of actual notice of the Plaintiffs rights and obligations. [Pl. Response at 34.]

The Court agrees with Defendants that Plaintiffs' arguments attempt to impose upon the *Guy* court and Defendants duties that do not exist under Rule 23. No notice of a dismissal or settlement to former putative class members is required if there has been a judicial denial of class certification.[8] *See Diaz v. Trust Territory of Pacific Islands*, 876

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[8] The cases cited by Plaintiffs do not suggest that they were entitled to notice of the settlement and dismissal of *Guy* and *Doe I*. Rather, those cases support the proposition that a court should provide absent class members with notice of a settlement that occurs *pre-certification*—not notice of a settlement and dismissal after class certification has been denied. *See Gupta v. Penn Jersey Corp.*, 582 F.Supp. 1058, 1060 (E.D.Pa.

F.2d 1401, 1406 (9th Cir. 1989); *Rineheart v. Ciba-Geigy Corp.*, 190 F.R.D. 197, 200 (M.D. La. 1999). As noted in *Dyer v. Publix Super Markets, Inc.*:

> [O]nce class certification is denied, no class exists and Fed.R.Civ.P. 23 no longer applies. Clearly, Rule 23(d)(2), which begins 'in the conduct of actions *to which this rule applies*,' became inapplicable upon entry of the Order denying class certification. The Court, thus, finds that it has no authority under Fed.R.Civ.P. 23(d)(2) to enter the requested, order [requiring notice of denial of certification].

Dyer v. Publix Super Markets, Inc., 2000 U.S. Dist. LEXIS 7977 (M.D.Fla. 2000) (*referencing similar holdings* in *Marian Bank v. Electronic Payment Services, Inc.*, 1999 U.S.Dist. LEXIS 3097 (D.Del. 1999); *Weisman v. Darneille*, 78 F.R.D. 671 (S.D.N.Y. 1978).

When, as in *Guy* and *Doe I*, the court determines that a matter shall not proceed as a class action, Rule 23 does not require the court to take additional steps to protect the interests of absent class members. Rather, after a denial of class certification, *American Pipe* tolling allows individual members of the putative class "to file their own suits or to intervene as plaintiffs in the pending action." *Crown, Cork*, 462 U.S. at 354. "[O]nce the district court enters an order denying class certification, the excluded putative class members are put on notice that they must act independently to protect their rights . . . ." *Piney Woods Country Life School*, 170 F.Supp.2d at 685. Thus, the Plaintiffs' claim of an entitlement to receive a separate court-ordered notice of the settlement and dismissal of *Guy* and *Doe I* after the denial of class certification

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1984); *Rothman v. Gould*, 52 F.R.D. 494 (S.D.N.Y. 1971) (class notice of settlement ordered where class determination had not yet been made and class counsel appeared to have abandoned class interests); *Diaz v. Trust Territory of the Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989).

is neither contemplated by *American Pipe* tolling nor is it a requirement of Rule 23. This Court is of the opinion that, as Plaintiffs were not entitled to notice of settlement or dismissal because class certification had been denied, they may not now seek equitable tolling on that premise.

Plaintiffs further suggest that dismissal and settlement of *Guy* and *Doe I* were tainted by "collusion," but the Court finds nothing collusive in how these cases were resolved. For example, as part of their agreement to settle *Doe I*, the parties stipulated (1) that the Court would need to reach a decision on class certification and (2) that if the Court granted class certification, the Defendants could withdraw from the settlement. Neither of these stipulations between the settling parties compromised the *Doe I* court's ability to resolve the class certification issues on the merits, after the issue had been fully briefed by the parties with the requisite adversity. In both the first and second class actions, the Court exercised its discretion to approve these settlements and deny class certification in a manner consistent with the dictates of Rule 23. The Plaintiffs' conclusory allegations of "collusion" are in essence a collateral attack on this Court's previous orders and the recent decision of the Sixth Circuit, which finally put to rest all issues regarding class notice and class certification in the *Guy* Litigation. Nothing that occurred in the previous two lawsuits provides any factual or legal basis for tolling.[9]

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[9] Plaintiffs also suggest that they are entitled to equitable tolling based upon the filing of the previous class actions purporting to protect the interests of all similarly-situated individuals. The Court is puzzled by Plaintiffs reliance on *United States v. M. J. Kelley Corp. United States v. M. J. Kelley Corp.*, 995 F.2d 656 (6th Cir. 1993). *M. J. Kelley Corp.* provides no support for equitable tolling based on the mere fact that a class action has previously been filed. Rather, the *M. J. Kelley* court equitably tolled the statute of limitations where a plaintiff had timely filed a claim in the wrong court of venue, and subsequently re-filed in the proper venue after the limitations period had expired, indicating that "[t]his case strikes us as one particularly deserving of application of equitable tolling" because the venue

E. LEGAL DISABILITY OF INFANTS

Kentucky has a saving statute that provides:

> If a person entitled to bring any action mentioned in KRS 413.090 to 413.160, except for a penalty or forfeiture, was, at the time the cause of action accrued, an infant or of unsound mind, the action may be brought within the same number of years after the removal of the disability or death of the person, whichever happens first, allowed to a person without the disability to bring the action after the right accrued.

KY. REV. STAT. §413.170(1). Thus, the statute of limitations for claims governed by KY. REV. STAT. 413.140, is tolled until a party reaches the age of eighteen (18) years. KY. REV. STAT. §2.015 (establishing age of majority); KY. REV. STAT. §413.170(1); *see Hazel v. General Motors Corp.*, 863 F.Supp. 435, 438 (W.D.Ky. 1994).

Further, 18 U.S.C. §2255 provides for the minority of those alleging injury as follows:

> Any action commenced under this section shall be barred unless the complaint is filed within six years after the right of action first accrues or in the case of a person under a legal disability, not later than three years after the disability.

18 U.S.C. §2255(b). Accordingly, the Court shall consider the legal disability, notably the youth, of any plaintiff in this matter and compute the statute of limitations for each cause of action as appropriate.

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and jurisdictional requirements governing this cause of action are "ill-defined and unsettled." *Id.* at 660. Plaintiffs in the instant matter did not timely file their complaint in the wrong court, and the Court is at a loss to see how their failure to timely file could be attributed to lack of clarity in the law.

F. CONSIDERING CLAIM ACCRUAL, DISCOVERY RULE, AND INJURY OCCURRENCE RULE IN CONJUNCTION WITH APPLICABLE STATUTES OF LIMITATIONS AND TOLLING THEREOF FOR FEDERAL CLAIMS ALLEGED, ONLY THOSE CLAIMS OF JOHN DOE #21 FOR VIOLATIONS OF 18 U.S.C. §§2241, 2242, 2245, 2251, 2251 [sic], 2252, AND 2258 REMAIN

Claims accrual is determined by federal law, and, ordinarily, the Court will apply the "discovery rule" to establish the date on which the statute of limitations began to run, "*i.e.*, the date when the plaintiff knew or through the exercise of reasonable diligence should have known of the injury that forms the basis of his action." *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2003) (*citing Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984)); *Wilson*, 471 U.S. at 268-71; *Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 856 (6th Cir. 2003); *Sidney Coal Co., Inc. v. Massanari*, 221 F.Supp.2d 755, 769 (E.D.Ky. 2002). However, it is important to note that:

> . . . the discovery rule is only appropriate when a statute is silent on the issue. Otherwise, a federal court must follow a statute if it establishes a time of accrual.

Sidney Coal Co., Inc., 221 F.Supp.2d at 769-770 (internal citations omitted). Accordingly, the Court shall inquire into each cause of action set forth by Plaintiffs.

(1) DISCOVERY RULE IS APPLICABLE TO CLAIMS ALLEGED UNDER 18 U.S.C. §2255, 20 U.S.C. §1687(2) (A), AND 42 U.S.C. §§1981, 1983, 1985, AND 1986

Plaintiffs contend that they had no actual awareness of a direct connection between the LFUCG and its alleged role in those injuries inflicted upon them by Ron Berry during their participation in Micro-City government. As a result, Plaintiffs aver that the filing of the *Guy* suit on October 15, 1998 serves

as the first public indication of the LFUCG's responsibility for the injuries which Plaintiffs sustained and of actual awareness of any connection between LFUCG and that abuse. However, the Court finds that such an argument misconstrues the notion of accrual. General public awareness does not necessarily pinpoint that time when Plaintiffs became aware of their injuries. Rather, each Plaintiff was in a superior position to the general public with regard to discovering his or her own injuries from the time those injuries were allegedly inflicted.

"In applying a discovery accrual rule . . . discovery of the injury, not discovery of the other elements of the claim, is what starts the clock."[10] *Rotella v. Wood*, 528 U.S. 549, 555 (2000). Otherwise stated, "[a] plaintiff's action accrues when he discovers that he has been injured, not when he determines that the injury was unlawful." *Amini v. Oberlin College*, 259 F.3d 493, 500 (6th Cir. 2001). So it is that the Court must focus on the harm incurred, "rather than the plaintiff's knowledge of the underlying facts which gave rise to the harm."[11]

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[10] In fact, according to the United States Supreme Court, the discovery rule should not be misconstrued to include a plaintiff's ignorance of his legal rights for they were:

> . . . unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask.

United States v. Kubrick, 444 U.S. 111, 122 (1979).

[11] Ultimately, "[t]he limitation period may be triggered before a plaintiff has conclusive knowledge of an injury and its cause or of all the evi-

Friedman v. Estate of Presser, 929 F.2d 1151, 1159 (6th Cir. 1991); *see Ruff v. Runyon*, 258 F.3d 498, 500-501 (6th Cir. 2001). The test for when a plaintiff knew or should have known of his injury is "an objective one, and the Court determines 'what event should have alerted the typical lay person to protect his or her rights.'" *Sharpe*, 319 F.3d at 266 (*quoting Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991)). Thus, this Court must ascertain upon which date Plaintiffs knew or through the exercise of reasonable diligence should have known of the injury that forms the basis of their claims under 18 U.S.C. §2255, 20 U.S.C. §1687(2)(A) and 42 U.S.C. §§1981, 1983, 1985, and 1986.

In Counts One and Two, Plaintiffs pray for relief under 42 U.S.C. 1983 by and through injunction and monetary damages. In Count Seven, Plaintiffs complain of a conspiracy on the part of Defendants to violate their civil rights in violation of 42 U.S.C. §241, 42 U.S.C. §§1981 and 1981a and seek damages under 42 U.S.C. §§1983 and 1985 for alleged violations of the Thirteenth and Fourteenth Amendments to the U.S. Constitution and the Second and Eleventh Clauses of the Kentucky Constitution as a result of injuries allegedly sustained during their participation in the Micro-City Government program. [Compl. ¶179(a).] In Count Nine, Plaintiffs complain that Defendants failed to prevent or aid in preventing the wrongs allegedly committed against then-minor Plaintiffs during their participation in the Micro-City Government program or neglected or refused to prevent or aid in preventing those acts which they could have, "by reasonable diligence" have prevented in violation of 42 U.S.C. §1986. Finally, with regard to Plaintiffs' claims in Count Eleven under the Civil Rights Restoration Act of 1987, 20 U.S.C. §1687(2)(A), Plaintiffs state that Defendants engaged "in in-

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dence ultimately relied on to support his or her legal theory." *P.R. v. Zavaras*, 49 Fed. Appx. 836, 839-40, 2002 U.S. App. LEXIS 22687 (10th Cir. 2002).

tentional, wanton, reckless, and indifferent sexual harassment (discrimination on the basis of sex) of a protected class of citizens, the African-American Plaintiffs, and each of them," thus violating 20 U.S.C. §1681-88. [Complaint at ¶193.]

Applying the discovery rule, the Court finds that Plaintiffs were aware of the underlying injury of which Plaintiffs complain, the abuse at the hands of Berry at the same time that they were no doubt aware or should have been aware of the connection between the Micro-City Government and the LFUCG, which is to say that their cause of action had accrued at the time of the alleged abusive acts. Thus, notwithstanding any application of the discovery rule and tolling the time spent in class action litigation in the *Guy* Litigation, all Plaintiffs' claims under 20 U.S.C. §1687(2)(A) and 42 U.S.C. §§1981, 1983, 1985, and 1986 are time barred by the application of the relevant one year statute of limitations. As these causes of action accrued at the latest in May 1995 (the latest instance of abuse as alleged by John Doe #21), the one year statute of limitations expired for claims under 20 U.S.C. §1687(2) (A) and 42 U.S.C. §§1981, 1983, 1985, and 1986, at the latest, in May 1996.

Even considering that some of the plaintiffs were under a legal disability due to their young age, the Court finds that none of the Plaintiffs' claims subject to a one-year statute of limitations are viable at this time. The Court notes that the youngest plaintiff is John Doe #9, born on August 25, 1977. He reached the age of eighteen on August 25, 1995. This is to say that any claims subject to one-year statutes of limitations expired for John Doe #9, if his legal disability is considered, on August 25, 1996. John Doe #21 is the next youngest plaintiff. Alleging abuse in May 1995, his own disability for infancy would have been lifted on his eighteenth birthday, July 13, 1995, and those claims limited by a one-year statute of limitations would have expired on July 13, 1996. In any event, none of these claims would not be subject to tolling

upon the pendency of the *Guy* litigation as the statute of limitations expired long before that complaint was filed in October 1998. As the statute of limitations has run for all Plaintiffs, all claims arising under 20 U.S.C. §1687(2)(A) and 42 U.S.C. §§1981, 1983, 1985, and 1986 shall be dismissed with prejudice.

18 U.S.C. §2255 provides a private right of action to minor victims who suffer injury as a result of violations of various referenced statutes prohibiting sexual exploitation and other abuse of children, but the statute also bars complaints not filed within six years of the accrual of the right of action. 18 U.S.C. §2255(b). In Count Ten, Plaintiffs claim that Defendants violated or facilitated Berry's violation of 18 U.S.C. §§2241, 2242, 2243, and 2251-59 "by employing, using, persuading, inducing, enticing, or coercing said minors to engage in, or assisted other persons to engage in, or transported one or more of said minors in interstate commerce, within and without the Commonwealth of Kentucky, with the intent that said minor Plaintiffs engage in any sexually explicit conduct for the purpose of producing any visual depiction of same . . . " and through their knowledge that such visual depictions would be disseminated through interstate commerce. [Complaint ¶187.]

The discovery of the injury for these §2255 claims occurred at the time that Plaintiffs were allegedly employed, used, persuaded, induced, enticed, or coerced to engage in sexually explicit conduct for the purposes of producing visual depictions of the same while participating in the Micro-City Government program, which is to say that any facilitation on the part of Defendants necessarily occurred at the same time. The six-year statute of limitations for Plaintiffs' claims under 18 U.S.C. §2255, even when tolled by the pendency of the *Guy* Litigation, was expired for almost all Plaintiffs at the time the present matter were brought before this Court on

September 25, 2002.[12] Only those claims based on abuse occurring after early May 1995 would not be time barred.

With regard to those late 18 U.S.C. §2255 claims, John Doe #9 testified in deposition testimony that he was abused sometime in 1992, which is to say that ordinarily the six-year statute of limitations for that cause of action would have run at the latest on December 31, 1998 (the Court is not aware of the specific date alleged). Considering tolling for the pendency of the *Guy* litigation, the statute of limitations for that alleged act would have expired in May 2000.

As John Doe #21 has alleged the latest incidence of abuse, sometime in May 1995, the Court notes that the statute of limitations expired at the latest on October 14, 2002, assuming a May 31, 1995 accrual date and that he was part of the putative class for the *Guy* Litigation. However, the Court notes that if the claim accrued earlier in May 1995 it could be time barred. Construing the facts most favorably to Plaintiffs as the non-moving party, the Court finds that summary judgment is inappropriate at this time on the application of the six-year statute of limitations to John Doe #21's claims stated pursuant to 18 U.S.C. §2255. Further discovery will be necessary to ascertain the precise date on which John Doe #21 alleges that he was abused.

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[12] Defendants contend that the statute's language requires a plaintiff to sue within six years of the occurrence of the injury as Congress selected language that "incorporated the standard rule that the limitations period commences when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California*, 522 U.S. 192, 201 (1997) (construing the six year limitations period in 29 U.S.C. §1451(f)(1)). Defendants take the position that Congress has not indicated that the accrual of the six-year limitations period in 18 U.S.C. §2255(b) should be subject to a discovery rule. However, this Court is of the opinion that discovery of the underlying injury alleged is likely relevant but need not decide that to be the case as the discovery of the injury and the injury in the instant matter are necessarily simultaneous.

(2) RICO CLAIMS ALLEGED IN COUNT SIX ARE GOVERNED BY A FOUR YEAR STATUTE OF LIMITATIONS AND SUBJECT TO THE INJURY OCCURRENCE ACCRUAL STANDARD

In Count Six, Plaintiffs allege that the actions complained of constitute a pattern of racketeering activity over the course of three decades in violation of 18 U.S.C. §§1961(1)(B) and 1962(b), (c), and (d) through Defendants' alleged conspiracy with Berry and with each other using their "individual offices and/or positions of authority" in order to commit a variety of alleged predicate acts that perpetuated the Micro-City Government program and allegedly permitted Berry to remain in contact with Plaintiffs through his role in that program whereby he allegedly committed the acts of abuse at the heart of this case. [Complaint ¶174.] The limitations period for such a RICO claims is four years. *Malley-Duff & Assoc., Inc.*, 483 U.S. 143; *Caproni*, 15 F.3d at 619. To date the Supreme Court has declined to chose between the general discovery rule and the "injury occurrence" rule for RICO claim accrual.[13] *See Rotella*, 528 U.S. at 554 n.2 (rejecting "injury and pattern" discovery rule, but declining to choose between discovery and "injury occurrence" rules); *Bygrave v. Van Reken*, 2000 U.S. App. LEXIS 29377 *13 n. 5 (6th Cir. 2000).

Defendants argue that the accrual rule most consistent with logic and existing Supreme Court jurisprudence is the "injury occurrence" rule. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 196 (1997) (Scalia, J., concurring). This Court agrees as accrual of claims under the Clayton Act is based on the date of the antitrust injury alleged, and the RICO statute of limitations is drawn from the Clayton Act. *See Malley-Duff &*

[13] While it has been taught in the Sixth Circuit that a RICO action accrues when a plaintiff knew or should have known of a defendant's fraudulent scheme, the Supreme Court has determined that an injury and pattern discovery rule, as such, is inappropriate. *See Rotella v. Wood*, 528 U.S. 549, 554 n.2; *Hofstetter v. Fletcher*, 905 F.2d 897, 904 (6th Cir. 1988).

Assoc., Inc., 483 U.S. 143. In his concurring opinion in *Klehr*, Justice Scalia wrote of this issue:

> [I]t takes no profound analysis to figure out what the decision must be. "Presumably the accrual standards developed by the lower federal courts in . . . civil antitrust litigation should be equally applicable to civil enforcement RICO actions." 1 C. Corman, Limitation of Actions § 6.5.5.1, pp. 447-48 (1991).

Id. at 198. Common sense would indicate that accrual standards and statutes of limitations go together. The former provides the minimum requirements for the action while the latter sets the outer limits of its temporal growth. As the highest court in the land has seen fit to adopt the statute of limitations from the Clayton Act, this Court sees no reason why the complementary accrual standard should not also be adopted for RICO claims: the "cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business . . . []" or, in this instance, commits an act that injures a plaintiff. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971).

The acts complained of would all necessarily have taken place during the time that Micro-City was operating under the leadership of Berry, a period of time that ended in 1995. Further each of Plaintiffs' alleged injuries culminated as a result of any alleged RICO predicate acts, thus, occurring at the time that they were allegedly abused during their participation in the Micro-City Government program. Accordingly, the Court shall again take up the issue of the youngest plaintiffs and those with the latest dates of injury to determine if any plaintiffs have claims that remain viable and within the statute of limitations.

John Doe #9's RICO claims are time barred for the four year statute of limitations for his RICO claims would have run at the latest, if his legal disability and tolling for the pendency of the *Guy* Litigation is considered, in mid-January

2001. John Doe #21 presents a similar situation. He was born on July 13, 1977 and has testified in deposition testimony that he was abused or molested by Berry, stating:

> . . . once was in '90, 1990, around—about the summer time, and the second time was like '95, that was about May.

[John Doe #21 Depo. at 8.] John Doe #21's RICO claims are also barred, even when tolling for the pendency of the *Guy* litigation and his legal disability are considered, as they expired on November 25, 2000. As noted before, the instant matter was not commenced until the complaint was filed on September 25, 2002. As the latest the statute of limitations could have expired for any plaintiff was in mid-January 2001, there remain no viable claims for RICO violations under §§1961(1)(B) and 1962(b), (c), and (d), and any such claims shall be dismissed with prejudice.

G. COURT DECLINES TO EXERCISE SUPPLEMENTAL JURISDICTION OVER REMAINING STATE CLAIMS IN COUNTS FOUR, FIVE, TWELVE, AND THIRTEEN FOR THOSE PLAINTIFFS WHOSE FEDERAL CLAIMS HAVE BEEN DISMISSED

28 U.S.C. §1367(c) provides that a district court:

> . . . may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction.

28 U.S.C. §1367(c). In this matter, the Court has dismissed all claims pled by all Plaintiffs, except for John Doe #21's 18 U.S.C. §2255 claim, arising under federal law and over which it had original jurisdiction. The Court now declines to continue exercising supplemental jurisdiction under 28 U.S.C. §1367 over those remaining state claims raised by those Plaintiffs, other than John Doe #21, and pending against Defendants. All such claims shall be dismissed without prejudice.

H. CONCLUSION

For all of the reasons stated above, those claims alleged by Plaintiffs under 42 U.S.C. §13981 shall be dismissed with prejudice. Further, all federal claims raised by John Does #1-20 and 22-25 and Jane Does #1-3 are time barred and shall be dismissed with prejudice. As the Court declines to continue to exercise jurisdiction over the pendant state claims of John Does #1-20 and 22-25 and Jane Does #1-3, their remaining state claims pending against Defendants shall be dismissed without prejudice. With regard to those remaining claims alleged by John Doe #21, his federal claims as alleged in Counts One, Two, Six, Seven, Eight, Nine, and Eleven are time barred and shall be dismissed with prejudice. Thus, the Court notes that the only remaining viable claims in this action belong to John Doe #21: a single federal claim in Count Ten (pursuant to 18 U.S.C. §2255) and those state causes of action alleged in Counts Four, Five, Twelve, and Thirteen.

Accordingly, *IT IS ORDERED:*

(1) that Plaintiff's motion for summary judgment [Record No. 56] be, and the same hereby is, *GRANTED IN PART AND DENIED IN PART;*

(2) that all pending federal claims be, and the same hereby are, *DISMISSED WITH PREJUDICE* with regard to John Does #1-20 and 22-25 and Jane Does #1-3;

(3) that all pending state claims be, and the same hereby are, *DISMISSED WITHOUT PREJUDICE* with regard to John Does #1-20 and 22-25 and Jane Does #1-3; and

(4) that John Doe #21's causes of action in Counts One, Two, Three, Six, Seven, Eight, Nine, and Eleven be, and the same hereby are, *DISMISSED WITH PREJUDICE.*

This the 14th day of April, 2003.

/s/ JOSEPH M. HOOD
JOSEPH M. HOOD, JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

[Filed Jun. 28, 2002]

CIVIL ACTION NO. 00-166-KSF

JOHN DOES, NUMBERS 1-17, Individually and on behalf of all other similarly situated, JOHN DOE, NUMBER 18,
PLAINTIFFS,

vs.

PAM MILLER, Individually, *et al.*,
DEFENDANTS.

ORDER

On Friday, June 28, 2002, at Lexington, came the plaintiffs, by counsel, Robert L. Treadway, J. Dale Golden, and William L. Huffman. The defendants were present, by counsel, Michael H. Baker and Donald D. Stepner. Also present was pro se movant Alexander D. Hall. These proceedings were recorded by Cindy Hutchinson, Official Court Reporter. This matter was called for Hearing.

The Court having heard the parties, and being sufficiently advised;

IT IS NOW THEREFORE ORDERED HEREIN AS FOLLOWS:

(1) That the motion of Alexander D. Hall to intervene as a matter of right is DENIED.

(2) That, upon withdrawal of objections by plaintiffs, the renewed motion of defendants to deny class certification is GRANTED.

(3) That the motion of plaintiffs for leave to file first amended complaint is GRANTED and the tendered complaint is FILED.

(4) That the Joint Motion to approve settlement is GRANTED.

(5) That the Court retains jurisdiction over the settlement herein.

(6) That this matter is dismissed as settled and stricken from the docket.

This the 28th day of June, 2002.

/s/ Karl S. Forester
KARL S. FORESTER, CHIEF JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

[Filed Apr. 4, 2000]

CIVIL ACTION NO. 98-431

KEITH RENE GUY, *et al.*
PLAINTIFFS,

v.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT
DEFENDANT.

OPINION & ORDER

This matter is before the Court upon the request of Craig Johnson and David T. Jones for notice to class members and for an opportunity to object to settlement. Having been fully briefed, this matter is ripe for review.

Stating that they are members of the putative class, Johnson and Jones have filed a request for notice to class members and for an opportunity to object to the settlement under the terms of Fed. R. Civ. P. 23(e). The parties object to this request and state that class certification was never sought because the class lacked numerosity and the questions of law or fact common to the members of the class do not predominate over any questions affecting only individual defendants.

Rule 23(e) provides:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the pro-

> posed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

A suit brought as a class action must be treated as a class action for purposes of dismissal or compromise from the time of filing until class certification has been determined; however, the applicability of Rule 23(e) notice prior to certification is unclear. Annotation, *Notice of Proposed Dismissal of Compromise of Class Action to Absent Putative Class Members in Uncertified Class Action Under Rule 23(e) of Federal Rules of Civil Procedure*, 68 A.L.R. FED. 290, 294, 298-99 (1984).

In *Muntz v. Ohio Screw Products*, 61 F.R.D. 396 (N.D. Ohio 1973), the plaintiff brought a Title VII suit on behalf of a class of past and present female employees. Prior to certification of the class, the plaintiff sought to amend the complaint to delete the class allegations and to enter a settlement dismissing the suit with prejudice as to the named plaintiff. *Id.* at 397.

The court stated that it could enter the settlement without notice only if it determined that the particular settlement was an exception to the notice requirement of Rule 23(e). The parties suggested that there might be an exception because the class had not been certified or because the settlement would be entered "without prejudice" to class members other than the named plaintiff. *Id.* at 398. Concluding that non-certification does not render notice unnecessary, the court stated that "[p]rior to class certification or a determination that class certification is not warranted, the Court must treat the suit as a class action for purposes of dismissal or settlement," *id.*, and noted two important policies of the notice requirement served by the class treatment of an uncertified suit: "reducing class allegations added solely to enhance the settlement of the representative plaintiff" and "informing those persons who have refrained from pursuing their own relief in reliance on the representation of the class representative," *id.* The court

also rejected the parties' argument that stipulating that the dismissal is "without prejudice" to all other class members renders notice unnecessary. The court stated that the statute of limitations would preclude claims by other class members. *Id.* at 399.[1]

To avoid giving settlement notice to an invalid class, the *Muntz* court then examined whether the alleged class was proper for certification. Since approximately ten persons would be within the class alleged, the court denied the class certification because the class was not too numerous to permit joinder and entered the settlement with respect to the individual plaintiff. *Muntz*, 61 F.R.D. at 399.

Fed. R. Civ. P. 23(a) sets forth four prerequisites to a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

This Court must "conduct a 'rigorous analysis' into whether the prerequisites of Rule 23 are met before certifying a class." *In re American Medical Sys.*, 75 F.3d 1069, 1078-79 (6th Cir. 1996). All four prerequisites of Rule 23(a) must be satisfied before a class can be certified. *Id.*

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[1] The Supreme Court has since held that the filing of a class action tolls the applicable statute of limitations, thus permitting all members of the putative class to file individual actions in the event that class certification is denied, provided that those actions are instituted within the time that remains on the limitations period. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983).

The parties state that class certification was never sought because of their determination that the class lacked numerosity. There is no strict numerical test for determining whether a class is so numerous that joinder is impracticable. *Id.* at 1079. "Rather, [t]he numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations.'" *Id.* (quoting *General Tel. Co. v. EEOC*, 446 U.S. 318, 330 (1980)). While there is no set number, courts have observed that generally less than twenty-one is inadequate, more than forty is adequate, and numbers between twenty-one and forty fall within a gray area. 5 *Moore's Federal Practice* § 23.22[3][a] (Matthew Bender 3d ed.).

Four named plaintiffs brought the instant case and Jones and Johnson moved to intervene. Considering that this lawsuit was filed in October 1998 and that there has been an enormous amount of publicity about the case, the Court believes that it is unlikely that many more alleged victims will come forward. Accordingly, the Court finds that the class is not so numerous that joinder is impracticable. Since the class fails to meet the prerequisites of Rule 23(a), notice to putative class members is not warranted.

The Court, being otherwise fully and sufficiently advised, HEREBY ORDERS that the request of Craig Johnson and David T. Jones for notice to class members and for an opportunity to object to settlement [DE #55] is DENIED.

This 4th day of April, 2000.

/s/ KARL S. FORESTER
KARL S. FORESTER, JUDGE

APPENDIX H

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 00-5434, 00-5569

KEITH RENE GUY, SR., as plaintiff and as class representative,
Plaintiff-Appellant,

CRAIG JOHNSON and DAVID T. JONES, individually, and on behalf of the class of persons similarly situated,
Intervening Plaintiffs-Appellants,

BARRY LYNN DEMUS, JR., *et al.*,
Plaintiffs,

v.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT,
Defendant-Appellee.

Jan. 15, 2003

On Appeal from the United States District Court for the Eastern District of Kentucky, at Lexington.

Before KRUPANSKY and BOGGS, *Circuit Judges*, and LAWSON, *District Judge*.*

LAWSON, *District Judge*.

Appellants, Craig Johnson and David T. Jones, appeal from an order denying their motion to require notice to putative class members of an impending settlement in an action alleging that the defendant, Lexington-Fayette Urban County Government (LFUCG), sponsored a youth summer program

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* The Honorable David M. Lawson, United States District Judge for the Eastern District of Michigan, is sitting by designation.

in which minors were allegedly made victims of sexual abuse. Appellants, whose motion to intervene as party plaintiffs was denied below, also challenge the lower court's determination that class certification should be denied. Appellant Keith Rene Guy, Sr., one of the original plaintiffs in the lower court, appeals from an order entered below which denied Guy's motion to disapprove the settlement of his individual claim, enforced that settlement, and dismissed Guy's case with prejudice. The appeals were consolidated for briefing and submission. After oral argument, appellants Johnson and Jones settled their case with LFUCG, and this court granted their joint motion to dismiss that appeal. Guy, however, has moved to reconsider the dismissal order because he desires to pursue an issue advanced by Johnson and Jones in their appeal. We decline to reconsider our order dismissing the companion appeal, and we affirm the district court's order dismissing Guy's case.

I.

LFUCG for many years conducted a summer youth program. As part of that program, Ronald C. Berry organized Micro-City Government, Inc., a non-profit corporation, whose primary goal was to provide part-time summer employment for disadvantaged youths. In this lawsuit filed by four men, including appellant Keith Guy, who participated as youths in Micro-City, it was alleged that Berry sexually abused them and that LFUCG officials were aware of the abuse and were deliberately indifferent to Berry's activities. In addition, the plaintiffs sought to represent a class of all persons "who were sexually assaulted by Ron Berry by virtue of his position of authority as director of MCG and recipient of LFUCG's funds to run a summer youth employment program." J.A. at 13. The plaintiffs alleged in their complaint that the members of the class are numerous, the issues of law and fact were common to the class, the plaintiff's claims were typical of those of other members of the class, and the plaintiffs would

fairly and adequately represent the interests of the other members of the class.

Although the case proceeded through discovery and into settlement negotiations, neither the plaintiffs nor the defendants sought a determination from the district court whether the class should be certified under Fed.R.Civ.P. 23. However, on January 12, 2000, appellants Johnson and Jones filed a notice of entry of appearance, request for notice to class members, and for an opportunity to object to settlement. In this filing, Johnson and Jones state that they had become aware of a pending settlement and wished to be heard by the court as to why the settlement should be rejected. Johnson and Jones maintained that the court was required to reject the settlement because no provision was made for notice to the putative class members.

Two days later, the four original plaintiffs and the defendant, LFUCG, agreed to a settlement and filed a Joint Motion to Enter Agreed Order of Dismissal. J.A. at 35. The proposed settlement required dismissal with prejudice of the named plaintiffs' cases, but provides that no action would be taken as to the class action allegations because the district court had not yet certified the class. Both LFUCG and the named plaintiffs also filed responses in opposition to Johnson's and Jones' filings, contending that class certification was not warranted by the facts of the case. Remarkably, in direct contradiction of the allegations in their complaint, the plaintiffs stated in their filing that "[t]he Plaintiffs have never requested that the subject action be certified as a class action principally because of numerosity." J.A. at 38. Then, apparently confessing a violation of Fed.R.Civ.P. 11, the plaintiffs stated, "The Plaintiffs have *never* believed that the class was . . . so numerous that joinder of all members [was] impracticable." J.A. at 38 (internal quotes omitted; emphasis added).

On January 31, 2000, Johnson and Jones filed their motion to intervene as plaintiffs together with a proposed intervening

complaint in which they alleged that they, too, were victims of Berry's abuse, sought to represent the class of Berry's other victims, and included allegations of commonality, numerosity, typicality, and adequacy of representation.

The district court held a hearing on all pending matters on February 4, 2000, which began with a comment by Johnson's and Jones' attorney that named plaintiff Keith Guy had mailed a *pro se* motion to disapprove the settlement, a copy of which the court eventually received later that day. The court read the handwritten letter-motion into the record as follows:

> Here's what he says. Comes now the plaintiff, Keith Rene Guy, Sr., and moves the court for an order transporting me to court on 2-4 and disapproving the settlement as follows: One, I have discharged my lawyers; two, I have not seen any agreement concerning any settlement; three, I feel that my lawyers did not act in my best interest when they accepted this offer for me; four, I am in the Fayette County Detention Center, and I believe that no arrangements have been made for my appearance on 2-4.

Guy's "former" lawyers professed ignorance of their apparent discharge and informed the court that Guy had given them full authority to settle the case, although they had not yet obtained Guy's signature on any settlement documents. LFUCG's counsel stated that Guy's acceptance of the settlement had been communicated by the attorneys for the plaintiffs, and that Guy's change of heart could have resulted from the service of writs of garnishment attaching his share of the settlement proceeds. Another attorney, Gayle Slaughter, advised the court that Guy had asked her to attend the hearing on his behalf and informed the court that Guy was then incarcerated. The court scheduled a hearing on Guy's objec-

tions to the settlement for February 25, 2000, and then considered the settlement as to the remaining plaintiffs in light of the intervention effort by Johnson and Jones.

Counsel for Johnson and Jones acknowledged that he could take no position as to the settlement proposed by the remaining named plaintiffs. ("Obviously, it's none of my business if these four individual plaintiffs settle out their claims. That's between them and the City, and I have no dog in that fight, certainly." J.A. at 127.) His concern was focused on his own clients' vulnerability to a statute of limitation defense, and losing the opportunity to litigate the class certification question. Johnson and Jones, however, offered no evidence on the class certification issue at that hearing.

Apparently accepting the named parties' argument that intervention was not timely and would unduly delay the settlement, but attempting to accommodate the proposed interveners' stated concerns, the court entered the following order:

> (1) That the Motion of Craig Johnson and David T. Jones to Intervene be and it is hereby DENIED. The commencement of a class action suspends the applicable statute of limitations as to all putative class members, and once tolled, the statute of limitations remains tolled for all putative class members until class certification is denied or the case is dismissed. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983). Therefore, the filing of this action tolled the statute of limitations for Johnson and Jones.
>
> . . .
>
> (3) That the Pro-Se Motion of Keith Rene Guy, Sr., to Disapprove the Settlement be and it is hereby ASSIGNED FOR HEARING ON FRIDAY, FEBRUARY 25, 2000, AT 2:00 P.M.
>
> . . .

(5) That the Joint Motion of the parties to approve the settlement be and it is hereby GRANTED with regard to the plaintiffs, Barry Lynn Demus, Jr., Christopher Andre Williams, and Octavius Gillis. Those plaintiffs' claims against the defendant are hereby DISMISSED WITH PREJUDICE.

(6) That the Court RESERVES RULING on the Request of Craig Johnson and David T. Jones for Class Certification.

February 4, 2000 Order.

At the February 25, 2000 hearing, the court heard the testimony of Guy and his former attorneys, Robert Reeves and David Friedman. Reeves stated that negotiations began with a $500,000 offer from LFUCG. This offer was rejected and the plaintiffs made a $600,000 counter-demand. The counter-demand was rejected and LFUCG refused to reinstate the previous offer. Then LFUCG offered $450,000 and this offer was accepted. Reeves advised that Guy had agreed to accept, stating

> [a]t that point, I already had Mr. Guy's approval to settle for 425, for his share your Honor, one-fourth of 425. In other words, he, as part of the four, would take 425. I called all of them and confirmed with each of them individually that they would take the 450 that was then the offer from the City. And that included Mr. Guy. I then informed everybody except Keith, I think, myself that the 450,000-dollar settlement was a done deal, in essence.

J.A. at 69. Reeves co-counsel stated that, in his conversations with Guy, the attorneys had been given full authority to settle in amounts less than other plaintiffs and less than the actual settlement amount. A notarized letter from Guy to Reeves dated January 12, 2000 (i.e., after the settlement negotiations had been concluded) was also presented to the court which

stated, "I feel that you gentlemen have done a fine job in my respect to you. . . . I want to thank each of you for all the hard work and fine time you spent. Thank you very much." Also in that letter, Guy instructed his attorneys to turn over the settlement proceeds to his mother. Appellee's Br. at 8.

Guy testified that he was willing to accept a settlement but received no communication from Reeves from the time Reeves said "all offers were off the table" until Reeves' office called stating there was a settlement but did not give the amount. The next day, Guy received a letter indicating that the settlement was $70,000 net to him. Guy stated that Reeves told him that Guy could not settle individually.

On February 28, 2000, the district court rejected Guy's motion to disapprove the settlement, concluding from the evidence that Guy had authorized his attorneys to settle the case on his behalf. The court held that events which occurred after Guy approved the settlement would not justify Guy's attempt to repudiate the settlement. The court then denied Guy's motion to disapprove the settlement, ordered the settlement enforced, and dismissed the case with prejudice.

On March 24, 2000, Guy timely filed his notice of appeal of this order. However, the issue of class certification remained pending, as did the motion by Johnson and Jones to compel notice to the putative class and an opportunity to object to the settlement. Since Johnson and Jones were not formal parties to the lawsuit, their motion to intervene having been denied, there was no one left in the case to urge class certification. Nonetheless, the district court felt obliged to address the issue, based on the authority of *Muntz v. Ohio Screw Prods.*, 61 F.R.D. 396 (N.D.Ohio 1973) (finding that settlement of named plaintiffs would not be approved without notice to putative class members if class certification was warranted by the facts). Accordingly, the court filed an

opinion and order on April 4, 2000 denying the motion by Johnson and Jones for notice to putative class members in which the court stated:

> Four named plaintiffs brought the instant case and Jones and Johnson moved to intervene. Considering that this lawsuit was filed in October, 1998 and that there has been an enormous amount of publicity about the case, the Court believes that it is unlikely that many more alleged victims will come forward. Accordingly, the Court finds that the class is not so numerous that joinder is impracticable. Since the class fails to meet the prerequisites of Rule 23(a), notice to putative class members is not warranted.
>
> Johnson and Jones filed a timely notice of appeal of this order on April 4, 2000.

Although not required by Federal Rule of Appellate Procedure 3, Guy listed in his notice of appeal the allegations of error he intended to advance in this court. Among them was the district court "not providing Notice of dismissal to class members as required under Rule 23(e)." That prompted a motion by LFUCG to dismiss that issue on appeal. LFUCG argued that Guy was not aggrieved by the lower court's ruling concerning notice to putative class members, that issue was raised only by the proposed intervenors, and therefore Guy had no standing to raise that issue on appeal. In response to the motion, Guy did not concede lack of standing, but he did agree to withdraw the notice issue from his appeal since appellants Johnson and Jones had raised the same issue in their appeal, assuring presentation of it to this court. On June 6, 2000, another panel of this court granted the motion to dismiss that issue from the appeal.

The appeals were then consolidated for briefing and argument. However, after the case was submitted following the April 24, 2002 oral argument, Johnson and Jones reached

a settlement with LFUCG, and those parties filed a joint motion to dismiss their appeal. Guy did not object to that motion—he claims not to have received notice of it—and this court granted the motion and ordered Johnson's and Jones' appeal dismissed on October 15, 2002.

On October 28, 2002, Guy filed a motion to reconsider our dismissal of the companion appeal, in which he seeks the opportunity to "continue litigating . . . issues regarding Notice [*sic*] to putative class members." Motion to Reconsider Order Entered October 15, 2002, at 3. LFUCG filed an answer in opposition in which it reasserted its lack-of-standing argument, and further contended that this court lacks jurisdiction to hear the issue because Guy's notice of appeal did not encompass it.

II.

There are several reasons that Guy's motion to reconsider the order dismissing the companion appeal should be denied. First, the effect of granting Guy's motion would be to revive an appeal, at the behest of a stranger, which the parties by stipulation have abandoned. Guy had no interest in the resolution of Johnson's and Jones' dispute with LFUCG. As a named plaintiff who had negotiated a settlement of his personal dispute in the district court, he had no direct interest in class certification, nor was he aggrieved by the court's determination that notice of this settlement need not be given to putative class members. In fact, in light of his attorney's record admission that the allegation of numerosity was disingenuous, perhaps inserted in the complaint solely to enhance the settlement prospects of the named representatives, it was an issue he ought not have pursued. In any event, because he was not aggrieved by that determination, he had no standing to challenge that ruling on appeal. *See Deposit Guar. Nat. Bank v. Roper*, 445 U.S. 326, 333, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980) ("Ordinarily, only a party aggrieved by a judgment or order of a district court may

exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it."); *Machella v. Cardenas*, 659 F.2d 650, 652 (5th Cir.1981). To use the words of counsel for the proposed intervenors, it was a "fight" in which Guy had "no dog."

Second, Guy abandoned this issue himself earlier in his own appeal. He attempted to raise the issue of lack of notice to putative class members in his notice of appeal, but the issue was withdrawn when this court granted LFUCG's motion to dismiss the issue, which Guy did not contest, presumably because of his belief that Johnson and Jones would pursue the issue in their separate appeal. Guy has not asked this court to reconsider the order granting that motion, which would have been a more direct way for Guy to resurrect the issue. In the present circumstances, the court is not inclined to grant Guy relief from his failure to foresee the possibility that Johnson and Jones would not continue their appeal.

Third, this court does not have jurisdiction to consider the lack-of-notice issue in Guy's appeal. Although the issue was mentioned in Guy's notice of appeal, the notice designated only the lower court's February 28, 2000 order as the one from which the appeal was taken. In that order, the lower court denied Guy's motion to disapprove the settlement, enforced the settlement agreement, dismissed Guy's claims with prejudice, and struck the case from the active docket. The question of notice to putative class members was not adjudicated in that order. Guy, therefore, failed to designate in his notice of appeal a judgment or order of the lower court which included the notice issue he seeks to pursue here.

Rule 3(c) of the Federal Rules of Appellate Procedure governs the content of notices of appeal. The rule states that notices of appeal must "specify the party or parties taking the appeal," "designate the judgment, order, or part thereof being

appealed," and "name the court to which the appeal is taken." Fed. R.App. P. 3(c)(1). Thus, Rule 3(c)(1)(B) requires designation of the order from which an appeal is taken. *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 756 (6th Cir.1999). Rule 3(c) is jurisdictional and may not be waived by the court of appeals. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988) (although a court may construe the Rules liberally in determining whether they have been complied with, a court may not waive the jurisdictional requirements of Rule 3 even for "good cause shown"); *Universal Management*, 191 F.3d at 756 (holding that because the appellant's notice of appeal referenced only the district court's summary judgment rulings, the court did not have jurisdiction to consider issues raised in a motion for reconsideration not referenced in the notice of appeal). *See also Trivette v. New York Life Ins. Co.*, 270 F.2d 198, 199 (6th Cir.1959) (holding that if the court of appeals regards a notice of appeal as being insufficient, the court can at any time, with or without motion to dismiss, raise the jurisdictional question *sua sponte*).

Although "the law is well settled that an appeal from a final judgment draws into question all prior non-final rulings and orders," *McLaurin v. Fischer*, 768 F.2d 98, 101 (6th Cir.1985), if an appellant "chooses to designate specific determinations in his notice of appeal—rather than simply appealing from the entire judgment—only the specified issues may be raised on appeal." *Id.* at 102; *see also Crawford v. Roane*, 53 F.3d 750, 752 (6th Cir.1995). Therefore, where "a party intentionally does not appeal a part of judgment, he cannot, after the time for filing has elapsed, change his mind and appeal from that part of the judgment." *Bach v. Coughlin*, 508 F.2d 303, 307 (7th Cir.1974); *see also Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 516 (6th Cir.1991) (holding that the plaintiff failed to preserve any

state law contract/promissory estoppel claim for appeal where, in his notice of appeal, the plaintiff failed to raise dismissal of state law claims as matters for appeal).

"[L]itigants are charged with the responsibility for complying with the Federal Rules of Appellate Procedure." *Maerki v. Wilson*, 128 F.3d 1005, 1007 (6th Cir.1997). The court of appeals cannot excuse noncompliance. *Torres*, 487 U.S. at 317.

> Rather plainly, certain rules are deemed sufficiently critical in avoiding inconsistency, vagueness and an unnecessary multiplication of litigation to warrant strict obedience even though application of the rules may have harsh results in certain circumstances. Under *Torres*, Rule 3(c) is such a rule.

Universal Management, 191 F.3d at 757 (quoting *Minority Employees v. Tennessee Dep't of Employment Sec.*, 901 F.2d 1327, 1329 (6th Cir.1990) (en banc)). Guy chose to limit his appeal to the lower court's rulings contained in the February 28, 2000 order. Because that order did not adjudicate the question of whether notice to putative class members was required before approval of a settlement, this court lacks jurisdiction to review it now that the companion appeal has been dismissed.

III.

Guy also contends that the district court should not have held him to his earlier agreement to settle his case. The standard of review which we apply when reviewing a district court's determinations are "traditionally divided into three categories." *Lion Uniform, Inc., Janesville Apparel Div. v. NLRB*, 905 F.2d 120, 123 (6th Cir.1990) (quoting *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988). Denominated questions of law are reviewed *de novo*, questions of fact are reviewed for clear error, and matters of discretion are reviewed for abuse of discretion. *Id.* The

admission of evidence is reviewed for an abuse of discretion. *United States v. Humphrey*, 279 F.3d 372, 376 (6th Cir.2002).

It is beyond debate that the district court has the "inherent authority and equitable power to enforce agreements in settlement of litigation before it." *Bowater N. Am. Corp. v. Murray Machinery, Inc.*, 773 F.2d 71, 76 (6th Cir.1985). A valid settlement agreement can only be set aside for fraud or mutual mistake of fact. *Estate of Jones v. Comm'r of Internal Revenue*, 795 F.2d 566, 573-74 (6th Cir.1986). Fraud can be either actual or constructive. Actual fraud is "deception intentionally practiced to induce another to part with property or to surrender some legal right" while constructive fraud is the "breach of legal or equitable duty which, in spite of the fact that there is no moral guilt resulting from the breach of duty, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests." *Epstein v. United States*, 174 F.2d 754, 765-66 (6th Cir.1949).

Guy asserts, however, that the record does not even support the conclusion that his lawyer was authorized to compromise his claim because the statements which support the contention that Reeves had the authority to settle were made by Reeves prior to his testimony under oath. Therefore, Guy argues, these statements are not evidence, citing *United States v. Hamilton*, 128 F.3d 996, 999 (6th Cir.1997), and could not form the basis for the district court's decision that a settlement was reached in the first place.

In *Hamilton*, we held that an attorney's statement to the court that her client likely intended to commit perjury concerning some fabricated receipts constituted inadmissible hearsay and should not have been used as the basis to exclude the evidence at trial. Attorney Reeves' statements about Guy's authorizing him to settle the case, however, are not properly analyzed as hearsay because they contain no "assertion," and the statements themselves have independent legal

significance as a verbal fact. *See United States v. Moreno*, 233 F.3d 937, 940 (7th Cir.2000); 2 McCormick on Evidence § 249 (5th ed.1999); *cf. Trepel v. Roadway Express, Inc.*, 194 F.3d 708, 717 (6th Cir.1999). Moreover, we have held that statements made by an attorney "as an officer of the court . . . , pursuant to his ethical obligation, though conclusory, are made as if upon oath." *Smith v. Anderson*, 689 F.2d 59, 64 (6th Cir.1982). Another court has observed that

> a person who makes statements under oath or penalty of perjury is presumed to tell the truth, which is a cornerstone of the resolution of disputes under the "rule of law." Surely no less should be presumed with regard to such statements given by attorneys who in addition have taken an oath to uphold the law as officers of the court. As with most presumptions, this one is also rebuttable.

Carbo Ceramics, Inc. v. Norton-Alcoa Proppants, 155 F.R.D. 158, 164 (N.D.Tex.1994).

We conclude, therefore, that the statements of attorney Reeves provided an adequate factual basis for the district court to find that Guy authorized his attorneys to settle his case for the amount ultimately approved by the court. Even if Guy was later misinformed about the disposition of the settlement proceeds and their exposure to his other creditors, as the record might suggest, there is no evidence of mutual mistake or fraud, and the decision by the district court was not clearly erroneous. The lower court, therefore committed no error in denying Guy's motion to disapprove the settlement and in enforcing the settlement agreement.

IV.

We find no basis to reconsider our order dismissing the companion appeal. We likewise find that the district court's approval and enforcement of the settlement agreement involving Keith Guy was not clearly erroneous. Accordingly,

Guy's motion to reconsider the order dismissing docket number 00-5569 is DENIED, and the order of the district court enforcing the settlement agreement and dismissing the case is AFFIRMED.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Aug. 12, 2005]

Nos. 03-6261/6490/6517/6560

JOHN DOE, *et al.*; KEITH RENE GUY, *et al.*,
Plaintiffs-Appellants,

v.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, *et al.*;
PAM MILLER, *et al.*,
Defendants-Appellees.

BEFORE: COLE and GILMAN, *Circuit Judges*; and POLSTER,* *District Judge.*

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active** judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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* Hon. Dan A. Polster, United States District Judge for the Northern District of Ohio, sitting by designation.

** Judge Rogers recused himself from participation in this ruling.

APPENDIX J

RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 23 (2003):

* * * *

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

* * * *

Fed. R. Civ. P. 60:

* * * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (4) the judgment is void ....